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PATTERSON.
INGRAHAM
LAUGHLIN
HOUGHTON
SCOTT

SUPREME COURT

Appellate Division—First Department.

EUGENE V. DALY, as Receiver of National Gramophone
Corporation,

Plaintiff-Respondent,

against

FRANK SEAMAN,

Defendant-Appellant.

CASE ON APPEAL.

WALDO G. MORSE,

Attorney for Defendant-Appellant,

10 Wall Street,

New York City.

OWENS & GRAY,

Attorneys for Plaintiff-Respondent,

189 Montague Street,

Brooklyn, N. Y.

THE REPORTER CO., WALTON, N. Y.
N. Y. Office, Charles Watson Russell,
253 Broadway, Room 205, Telephone 1863 Corl.

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Frederick N. Leonard:	
Direct	50

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Orville D. La Dow:	
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SUPREME COURT

NEW YORK COUNTY.

EUGENE V. DALY, as Receiver of
National Gramophone Corpora-
tion,

Plaintiff-Respondent,

against

FRANK SEAMAN,
Defendant-Appellant.

2

Statement Under Rule 41.

This action was commenced by the service of the summons on the 30th day of October, 1905, on which day the defendant appeared herein by Waldo G. Morse, his attorney.

The plaintiff served his complaint on the 20th day of November, 1905.

The defendant served his answer on the 30th day of December, 1905.

The plaintiff appeared herein by Strong & Cadwalader, Esqs., of No. 40 Wall St., Borough of Manhattan, City of New York, who were succeeded as attorneys for the plaintiff, by Ketcham & Owens, Esqs., of No. 189 Montague St., Bor. of Brooklyn, City of New York, by order of substitution, entered in the office of the Clerk of New York County on the 14th day of December, 1906, Owens & Gray, Esqs., were substituted as attorneys for the plaintiff in place of Ketcham & Owens, dissolved.

3

4 The defendant appeared herein by Waldo G. Morse, Esq., of No. 10 Wall St., Bor. of Manhattan, New York City.

The names of the original parties in full are as stated in the above title. There has been no change of parties or attorneys since the commencement of this action, except as stated above.

The action was tried before Hon. Henry Bischoff, at a Special Term for Trials, held at the County Court House, Borough of Manhattan, on the 19th day of December, 1907.

On the 6th day of January, 1908, the cause was finally submitted to the Court for decision and the defendant submitted to the Trial Justice certain requests to find.

5 Thereafter and on the 15th day of April, 1907, the Court made and filed its decision in favor of the plaintiff and against the defendant and directed judgment as prayed by the plaintiff in his complaint, and the interlocutory judgment appealed from was thereupon entered in the office of the Clerk of New York County on the same day.

Exceptions to said decision and the Courts refusal to find as requested were served and filed by the defendant on the 5th day of May, 1908.

6 On the trial the plaintiff appeared by Herbert T. Ketcham, Esq., and James M. Gray, Esq., and the defendant appeared by Waldo G. Morse, Esq., his attorney, and Rush Taggart, Esq., and James DeWitt Andrews, Esq., of counsel.

The defendant served and filed his notice of appeal on the 24th day of April, 1908.

Notice of Appeal.

7

SUPREME COURT.

COUNTY OF NEW YORK.

EUGENE V. DALY, as Receiver of
National Gramophone Corpora-
tion.

Plaintiff,

against

FRANK SEAMAN,

Defendant.

8

Please take notice, that the defendant Frank Seaman hereby appeals to the Supreme Court, Appellate Division, First Department, from the interlocutory judgment of this Court herein entered in the office of the Clerk of the County of New York on the 15th day of April, 1908, and from each and every part of said interlocutory judgment.

Dated, April 23, 1908.

Yours, &c.,

WALDO G. MORSE,

Attorney for Defendant-Appellant,

#10 Wall Street,

N. Y. City.

9

To

Owens & Gray, Esqs.,

Attys. for Plaintiff-Respondent.

#189 Montague St., Brooklyn, N. Y.

County Clerk.

New York County.

10

Summons.

SUPREME COURT,

COUNTY OF NEW YORK.

EUGENE V. DALY, as Receiver of
National Gramophone Corpora-
tion,

Plaintiff,

against

FRANK SEAMAN,

Defendant.

Action No. 3.

11

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, October 26th, 1905.

STRONG & CADWALADER,

Plaintiff's Attorneys,

Post Office Address and Office,

12

No. 40 Wall Street,

Borough of Manhattan,

New York.

Complaint.

13

SUPREME COURT.

COUNTY OF NEW YORK.

EUGENE V. DALY, as Receiver of
National Gramophone Corpora-
tion.

Plaintiff,

against

FRANK SEAMAN,
Defendant.

14

The plaintiff, complaining of the defendant, shows
to the court, upon information and belief:

1. That the National Gramophone Corporation was
heretofore, and on or about the 10th day of March,
1899, duly organized under the laws of the State of
New York, known as the Business Corporation Law,
having an authorized capital stock of eight hundred
thousand dollars (\$800,000), for the purpose of manu-
facturing, selling, leasing, operating and dealing in
talking machines or instruments for recording and re-
producing sound, and for other purposes. That there-
after and on or about the 13th day of September,
1901, application was made by the directors of the said
corporation to the Supreme Court in the County of
Westchester for a voluntary dissolution of said cor-
poration and such proceedings were subsequently had
upon the said application: that this plaintiff was by an
order of the said court made the fifth day of April,
1902, duly appointed permanent receiver of the said
corporation and thereafter duly qualified and entered
upon the performance of his duties as such receiver.
That leave has been duly granted by the Supreme
Court to bring this action.

15

- 16 2. That on or about the tenth day of October, 1896, the defendant entered into a certain contract with the Berliner Gramophone Company, a corporation duly organized under the laws of the State of Virginia, the said Berliner Company being at that time the sole manufacturer of disc talking machines and records, whereby it was agreed that the said company should manufacture exclusively for the defendant and that he should be the exclusive sales agent therefor. That thereafter and on or about the 4th day of November, 1896, the defendant caused to be organized under the laws of the State of New York a corporation known as the National Gramophone Company, for the purpose, among other things, of selling talking machines and records.
- 17 That the capital stock of the said corporation consisted of fifty thousand dollars (\$50,000) par value, being 500 shares of \$100 each. That the said contract further provided that the said defendant should have the privilege of assigning the same to such corporation as he might organize for the purpose provided that the said Berliner Company should approve of such organization. That at a meeting of the directors of said National Gramophone Company, held on the 4th day of November, 1896, it was resolved:
- ✓ "That a certain contract or agreement, dated the 10th day of October, 1896, executed by and between the Berliner Gramophone Company of Virginia and Frank Seaman, of New York, and all rights and privileges secured thereby be acquired by the company for its use, and that the rights and privileges of said Frank Seaman thereunder be transferred to this company as fully as he is able to transfer the same, and that this
- 18 company take the agreement of said Frank Seaman to use his best endeavors to secure the recognition by the said Berliner Gramophone Company of such transfer and that he agree in case such recognition cannot be secured to act with this company and place in its charge all the business to be carried on by him under

such contract, obtain and turn over to this company all goods thereunder which may be advantageously used by this company, and turn over and deliver to this company all profits and advantages whatever which he may derive from his said contract with the Berliner Gramophone Company, and that such contract be accepted as full payment of the subscription of Frank Seaman to the capital stock of the company, made in its certificate of incorporation, amounting to 498 shares of the value of \$49,800, and that said stock of this company be issued fully paid and non-assessable in payment of said contract. That the officers of the company be authorized and directed to receive a transfer of such contract accordingly, and issue such stock pursuant to this resolution." That in pursuance of the said resolution the said 498 shares of stock was issued to and accepted by the defendant, who thereupon undertook to transfer to the said company his said contract with the Berliner Gramophone Company, and all his rights thereunder. That thereafter the said Seaman endeavored to procure the consent and approval of the Berliner Gramophone Company to his assignment of the aforesaid contract to the said company, and was unable so to do, and it was thereafter agreed between the said National Gramophone Company and the defendant that the business should be carried on as regards the Berliner Gramophone Company in the name of the defendant, but for the benefit of the National Gramophone Company.

3. That on or about the 31st day of March, 1899, the said National Gramophone Company assigned and transferred to the National Gramophone Corporation all its assets, including all its interest in the said contract between the defendant and the Berliner Gramophone Company, and in the aforesaid agreement between itself and the defendant, and all rights and privileges thereunder, and that such assignment was made with the consent and approval of the defendant. That subsequently, and in the year 1900, disputes having

- 22 arisen between the defendant and the said Berliner Gramophone Company, the latter company refused to continue to furnish disc talking machines and records to the said defendant or through him to the National Gramophone Corporation, to the great loss and injury of said last named corporation. That thereupon a suit was instituted in the name of the defendant but for the benefit of the said corporation against the Berliner Gramophone Company, in the United States Circuit Court, for the District of West Virginia, for the recovery of damages by reason of said breach of contract. That subsequently another suit was similarly instituted in the name of the defendant, but for the benefit of the said corporation, against the Victor Talking Machine Company, (a corporation which has succeeded to the rights of the said Berliner Gramophone Company in the manufacture of disc talking machines, and which had also succeeded to the obligations of the said company), under the aforesaid contract with the defendant for the recovery of further damages by reason of a breach of said contract, and that subsequently and on or about the 1st day of May, 1903, the defendant settled and discontinued the said suits, and relieved the defendants therein from all liability for such breaches of contract, and in consideration thereof received the sum of thirty-five thousand dollars (\$35,000) in cash and also shares of the capital stock of the Victor Talking Machine Company, amounting to thirty-five thousand dollars (\$35,000)
- 23 at par value. That the said money and property so received by the defendant in the settlement of the aforesaid litigation was received by him for the benefit of the National Gramophone Corporation. That the net amount so received by him, over and above his reasonable expenses and disbursements in and about the said litigation, should be impressed with a trust for the benefit of the said corporation, its creditors and stockholders and that he should be required to account therefor to this plaintiff.
- 24

4. That the plaintiff has demanded of the defendant 25
that he account to the plaintiff for the profits of said
litigation so received by him as aforesaid, and he has
neglected and refused so to do.

Wherefore the plaintiff prays that the defendant ac-
count to the plaintiff for all moneys and property col-
lected and received by him in the settlement of the
suits brought by him against the Berliner Gramo-
phone Company and the Victor Talking Machine Com-
pany, over and above his reasonable expenses and dis-
bursements therein, and that the plaintiff have such
other and further relief as may be just in the premises.

STRONG & CADWALADER,

Attorneys for Plaintiff,
No. 40 Wall Street,
Borough of Manhattan,
New York City.

26

State of New York. }
County of New York, } ss.:

Eugene V. Daly, being duly sworn, deposes and says
that he is the plaintiff in the above entitled action; that
he has read the foregoing complaint and knows the
contents thereof, and that the same is true to his own
knowledge, except as to the matters therein stated to
be alleged upon information and belief, and that as to
those matters he believes it to be true.

EUGENE V. DALY.

Sworn to before me this
25th day of October, 1905.
John F. Collins,
Commissioner of Deeds,
N. Y. City.

27

Answer.

SUPREME COURT.

COUNTY OF NEW YORK.

EUGENE V. DALY, as Receiver of
The National Gramophone Cor-
poration,

Plaintiff.

against

FRANK SEAMAN,
Defendant.

Action No 3.

29 The defendant, Frank Seaman, by Waldo G. Morse,
his attorney, for answer to the complaint in the above
entitled action, upon information and belief,

30 I. Denies that the plaintiff was duly appointed per-
manent Receiver of the National Gramophone Cor-
poration or duly qualified as such, or that leave has
been duly granted to the plaintiff to bring this action,
and denies that the plaintiff ever has been appointed
such Receiver or has qualified or has been authorized
to do any act as Receiver of said corporation and al-
leged in that regard; that the proceeding in which such
appointment was attempted to be made was brought
for the purpose of dissolving said corporation and
winding up its business upon the ground of its insol-
vency, and was a bankruptcy proceeding, and that by
reason of the Constitution and laws of the United
States relating to bankruptcies, in force at the time of
bringing said proceeding and which are still in force,
the statutes of the State of New York under which
said proceeding was attempted to be brought and main-
tained, were and are suspended in their operation and
of no force or effect by reason of the Constitution and
statutes of the United States aforesaid.

II. Denies that it was agreed between the National Gramophone Corporation and defendant that the business described in the complaint or any other business should be carried on as regards the Berliner Gramophone Corporation or any other person or corporation in the name of the defendant for the benefit of the National Gramophone Corporation or otherwise. 31

III. Denies that the refusal of the Berliner Gramophone Company to furnish records to this defendant or to the National Gramophone Company was any loss, damage or injury to said corporation or that any suit was instituted in the name of the defendant for the benefit of said corporation against the Berliner Gramophone Company or any corporation whatever for the recovery of damages by reason of said or any breach of contract or for any other cause whatsoever, and in like manner denies that any suit was instituted against the Victor Talking Machine Company, or that the same succeeded to the rights of the said Berliner Gramophone Company in the manufacture of Disk Talking Machines or records or in any other manner, or succeeded to the obligations of said company, or that the defendant settled and discontinued said suits or any of them and relieved the defendants therein from all liability or otherwise in consideration of the sum of \$35,000 in cash and shares of stock of the Victor Talking Machine Company amounting to \$35,000 par value, but admits that he did settle and discontinue certain suits on his own account and received thereupon and thereafter a sum much smaller in cash than that set forth in the complaint and certain stock in a corporation known as the Consolidated Talking Machine Company, but this defendant expressly denies that this money or any of the same or said property or any part thereof was received by him for the benefit of the National Gramophone Company or upon its account in any manner or form whatsoever, and denies that the same or any part thereof should be impressed with a trust for the benefit of said corpora- 32 33

34 tion or its creditors or stockholders or any of the same, or any person or persons, or that he should be required to account therefor or for any part thereof.

IV. And this defendant further answering alleges that the plaintiff has an adequate remedy at law for any and all the matters and things set up and alleged in the complaint aforesaid.

V. And this defendant further answering the said complaint alleges: that prior to the bringing of said or any of said actions or suits, the National Gramophone Corporation abrogated, cancelled, annulled and wholly did away with any and all contracts existing between said corporation and this defendant set up in said complaint or in any wise relating to the business
35 therein described, and that such cancellation was conferred in by this defendant and that thereupon any and all rights, relations, duties and obligations which existed or might have existed between, against or on the part of either of said parties as against the other in relation to the said matters and things, became and were wholly abrogated, terminated and at an end.

That in the bringing of the suits aforesaid, this defendant sought to interest said National Gramophone Corporation therein, but said corporation wholly declined to become interested in the same or to have any part therein or to assume any liabilities thereunder or by reason of the same, or to arrange for the acquisition of any rights therein or thereunder, and declined wholly and absolutely to recognize or consider
36 said suits or any of the same as brought for and on account of said corporation or in any wise for its benefit.

✓ That in the conduct of said suits, this defendant paid out and expended and became liable to lay out and disburse large amounts of money and employed his time and retained solicitors and counsel, all at great expense, and traveled and attended court, all at very great loss to this defendant, and that while so doing and thereafter this defendant applied to said National Gramophone Corporation for assistance and requested

that it would assume some portion of said expense or defray the same, but that said corporation wholly refused so to do or in any way to recognize said suits as for its benefit or charges in any wise against it. 37

VI. That at all the times aforesaid and up to the present time said corporation has been indebted to this defendant in large amounts of money advanced by him for and to the use of said corporation and that this defendant should not in equity and in good conscience be required or in any wise compelled to return to said corporation or account to it or its Receiver in equity for any sums or amounts whatsoever, without the allowance to him to be offset against any amounts in which he might be found indebted to said corporation of the claims, demands and cause of action so existing in his favor and against said corporation. 38

WALDO G. MORSE.

Attorney for Defendant.

Office and P. O. Address,

No. 10 Wall Street,

Borough of Manhattan,

New York City.

County of New York, ss.:

Waldo G. Morse, being duly sworn, deposes and says, that he is the defendant's attorney in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 39

Deponent further says, that the reason why this affidavit of verification is made by deponent and not by defendant is because the defendant is not within the County of Westchester, where deponent resides, nor within the County of New York, where deponent has an office for the transaction of business; that the sources of deponent's information and the grounds of his belief as to the matters set forth in the foregoing

40 answer are statements made by defendant to deponent of the facts relating to the subject-matter set forth in the complaint herein.

WALDO G. MORSE.

Sworn to before me this

29th day of December, 1905.

Frank Cochrane,

Notary Public (64),

New York County, N. Y.

Supplemental Answer.

41

SUPREME COURT.

NEW YORK COUNTY.

EUGENE V. DALY, as Receiver of
The National Gramophone Cor-
poration,

Plaintiff,

against

FRANK SEAMAN,

Defendant.

42

In and by this supplemental answer, which is served under and pursuant to stipulation as under an order of this Court, dated the 26th day of Nov., 1907, to which reference is hereby made, the defendant, Frank Seaman, by Waldo G. Morse, his attorney, for answer to the complaint in the above entitled action, upon information and belief:

Repeats all of the allegations in the answer herein contained, and makes them a part hereof.

And this defendant further answering the said complaint, and by way of supplemental answer alleges:

I. That on or about the 15th day of November, 1907, 43
 in an action pending in the Supreme Court of West-
 chester County, wherein this defendant was plaintiff,
 and the plaintiff herein was defendant, a verdict was
 rendered and a judgment subsequently and thereupon
 entered in the office of the Clerk of said County for
 the sum of \$36,033.55, wherein was litigated and ad-
 judicated the question whether the defendant in this
 action, the plaintiff in that had valid claims against
 the said corporation and this plaintiff in large amounts,
 and it was duly adjudicated that he had such claims,
 and also and likewise was litigated and adjudicated
 the question whether the defendant in this action ever
 had or received any sum whatsoever from or for the
 account of plaintiff in this action, or of the National
 Gramophone Corporation, for which said corporation 44
 the plaintiff is Receiver, and wherein it was adjudged
 and determined that the National Gramophone Cor-
 poration and the plaintiff herein, as Receiver, were and
 are indebted to the defendant to a large amount, viz:
 the sum of \$36,033.55, with interest, and that this de-
 fendant had never received payment or satisfaction
 therefor, or for any part thereof.

Wherefore, the defendant asks judgment that the
 complaint be dismissed with costs.

WALDO G. MORSE,
 Attorney for Defendant,
 10 Wall Street, New York, N. Y.

County of New York, ss.: 45

Waldo G. Morse, being duly sworn, deposes and
 says that he is the attorney for the defendant in the
 above entitled action. That he has read the foregoing
 supplemental answer, and knows the contents thereof:
 that the same is true of his own knowledge, except as
 to the matters therein stated to be alleged upon infor-
 mation and belief, and that as to those matters he be-
 lieves it to be true.

That the reason why this affidavit of verification is made by deponent and not by the defendant, is because the defendant is not within the County of Westchester where deponent resides, nor within the County of New York where deponent has an office for the regular transaction of his business; and that the sources of deponent's information and the grounds of his belief are that deponent is the attorney of record of the action set out in the supplemental answer herein and personally conducted the trial thereof.

WALDO G. MORSE.

Sworn to before me this
20th day of November, 1907.
Frank Cochrane,
Notary Public (69),
New York County.

SUPREME COURT,
COUNTY OF NEW YORK.

<u>EUGENE V. DALY, as Receiver of</u> <u>The National Gramophone Cor-</u> <u>poration.</u>	Plaintiff, against FRANK SEAMAN, Defendant.

The defendant submits the annexed statement of the facts which he deems established by the evidence herein, and of the rulings upon questions of law, which he deems made.

Dated January 6, 1908.

WALDO G. MORSE,
Attorney for Defendant,
No. 10 Wall Street,
Borough of Manhattan,
City of New York.

Defendant's Requests to Find.

49

SUPREME COURT,

COUNTY OF NEW YORK.

EUGENE V. DALY, as Receiver of
The National Gramophone Cor-
poration.

Plaintiff,

against

FRANK SEAMAN,

Defendant.

.50

The issues of fact coming on to be tried by the Court at a Special Term, held by the undersigned without a jury, and having been tried on the 19th day of December, 1907, and the allegations and evidence of the parties having been heard; now, after hearing Herbert T. Ketcham, of counsel for the plaintiff, and Waldo G. Morse, for the defendant, and due deliberation having been had, I decide and find as follows:

Findings of Fact.

I. The proceeding in which the plaintiff was appointed Receiver was brought to dissolve the National Gramophone Corporation, and distribute its assets among its creditors.

51

Found. H. B.

II. At the time of the bringing of such proceedings, said corporation was insolvent and unable to pay its debts and obligations in full.

Found. H. B.

52 III. The plaintiff herein was appointed Receiver for the purpose of winding up the affairs and distributing the assets of said corporation as provided by the Statutes of the State of New York.

Found. H. B.

IV. On or about the 10th day of October, 1896, the defendant entered into a contract in writing, dated on that day, with the Berliner Gramophone Company, in relation to the manufacture and sale of gramophones and gramophone goods.

Found. H. B.

53 V. The defendant executed and entered into a contract in writing with the National Gramophone Company, predecessor in interest of the National Gramophone Corporation, dated on the 4th day of November, 1896, whereby the said company acquired certain rights in regard to the subject-matter of said Berliner contract.

Found. H. B.

VI. Said contract between said National Gramophone Corporation and the defendant, embraced and contained all the agreements made and entered into by and between said parties to said contract, at that time.

Found. H. B.

54 VII. Said parties acted under the terms and provisions of said contract in their relations and dealings with each other, until the 1st day of October, 1897.

Found. H. B.

VIII. On or about the 1st day of October, 1897, said parties executed and entered into another contract in writing dated upon that day, in relation to the subject-matter of the said Berliner contract.

Found. H. B.

IX. Said two contracts embrace all of the contracts, covenants and agreements made or entered into by or

between said parties in relation to any rights accruing under the Berliner contract aforesaid, or the subject-matter of the same. 55

Found. H. B.

X. The said contracts embrace all of the contracts, covenants and agreements made or entered into by or between said parties in relation to the subject-matter of this action.

Found. H. B.

XI. The said contracts fix and define the only right, claim or interest which the said National Gramophone Corporation or the plaintiff, its Receiver, has or ever had in, under or by reason of the contract of October 10, 1896, between defendant and the Berliner Gramophone Company. 56

Found. H. B.

XII. On or about the 10th day of March, 1900, the Directors of the National Gramophone Corporation passed a resolution, and thereafter caused the defendant to be notified pursuant thereto, that unless he should furnish goods under said contract, said corporation would procure goods for the purpose of its business, elsewhere.

Found. H. B.

XIII. On the 2nd day of April, 1900, the directors of the National Gramophone Corporation passed a resolution, and thereafter caused the defendant to be notified pursuant thereto, that said corporation would procure its goods elsewhere. 57

Found. H. B.

XIV. The defendant has been, and always was, unable to secure the consent of the Berliner Gramophone Company to the assignment of his rights to the National Gramophone Corporation, as provided by the first contract, but endeavored so to do.

Found. H. B.

58 XV. The defendant supplied to the National Gramophone Corporation all goods ordered by it under the second contract, so far as he was able to secure the same under said contract.

Found. H. B.

XVI. The directors and officers of said corporation and also the defendant, understood that the said resolutions and notifications were intended to effect, and did effect and constitute a cancellation and rescission of said contract on the part of the corporation.

Refused. H. B.

XVII. The defendant concurred in such rescission and cancellation.

59 Refused. H. B.

XVIII. Thereupon the National Gramophone Corporation arranged to obtain its goods from the Universal Talking Machine Company, in which it owned a very large majority of the stock.

Found. H. B.

XIX. Such cancellation and arrangement for goods were had and carried out after full advisement and consideration, and were deemed by its directors advantageous to the said corporation.

Refused. H. B.

60 XX. Said directors and officers considered such cancellation and the substitution of goods supplied by the Universal Talking Machine Company for those of the Berliner Gramophone Company to be advantageous to the National Gramophone Corporation.

Refused. H. B.

XXI. The defendant, after the cancellation of said contract, opened on his own account an office for the sale of such gramophones and gramophone goods, the subject-matter of said contracts.

Refused. H. B.

XXII. The Berliner Gramophone Company threatened and made preparations to sell its goods to others than the defendant. 61

Found. H. B.

XXIII. Thereupon the defendant procured an injunction restraining the said Company from so doing.

Found. H. B.

XXIV. Said injunction was thereafter vacated and set aside, but later restored and reinstated.

Found. H. B.

XXV. Many suits were brought and maintained by the defendant against the Berliner Gramophone Company, the United States Gramophone Company, Eldridge R. Johnson, and the Victor Talking Machine Company. 62

Found. H. B.

XXVI. Suit was brought in the United States Circuit Court for the Southern District of New York, by the Berliner Gramophone Company against the defendant Seaman, to recover \$250,000 damages for the alleged breach of his contract.

Found. H. B.

XXVII. All of said litigation was conducted and the expense thereof borne exclusively by the defendant Seaman.

Found. H. B.

XXVIII. The defendant never made any claim against the National Gramophone Corporation by reason of his said disbursement, or for protection against said suit or liability. 63

Refused. H. B.

XXIX. Said corporation never offered to contribute toward or assume said expenses or liabilities, or any part thereof.

Found. H. B.

64 XXX. Schedules of assets and liabilities were made by the directors and officers of said corporation in said dissolution proceedings.

Found. H. B.

XXXI. No mention was made in said schedules of the said contracts or suits or of any right or liability whatsoever in relation thereto or to any of the same.

Found. H. B.

XXXII. In no way was the claim in suit or the contractual right out of which it is alleged to arise, included or mentioned in said schedules.

Found. H. B.

65 XXXIII. Subsequently to the appointment of this plaintiff as Receiver of the National Gramophone Corporation, the defendant realized certain moneys upon a settlement of all the litigation aforesaid.

Found. H. B.

Conclusions of Law.

I. The written contract between the National Gramophone Company and the defendant, dated the 4th day of November, 1896, constituted the agreement then made between said parties and involved in this action, and was the measure of their rights and obligations while it continued in force.

Found. H. B.

66

II. On or about the first day of October, 1897, said contract was wholly cancelled, annulled, abrogated and terminated by the execution of a new contract dated upon said day between the said parties embracing the same subject-matter, which said contract contained all of the covenants and agreements thereafter existing between said parties in relation to the transactions involved in this action.

Refused. H. B.

III. That the defendant kept and performed upon his part all the terms, covenants, conditions and obligations by him to be performed under and pursuant to said first contract. 67

Refused. H. B.

IV. That defendant also and likewise performed said second contract.

Refused. H. B.

V. That defendant in good faith used his best endeavors for the National Gramophone Company and the National Gramophone Corporation to secure in the first instance, the recognition of the conditional assignment made by him, and in the second place, under the second contract, to secure and furnish goods as therein provided. 68

Found. H. B.

VI. That no effective assignment or transfer was ever made by the defendant, of the rights or interests secured to him by his contract with the Berliner Gramophone Company, and the conditional transfer made by him never became effective.

Refused. H. B.

VII. Neither the National Gramophone Company or the National Gramophone Corporation ever secured, by reason of said conditional assignment, any claim or cause of action enforceable by it against the Berliner Gramophone Company.

Found. H. B. 69

VIII. That the National Gramophone Corporation by its properly constituted Board of Directors and officers, before the commencement of this action, cancelled, annulled and rescinded the said second contract, with the defendant.

Refused. H. B.

IX. That the National Gramophone Corporation and its properly constituted Board of Directors and officers,

70 before the commencement of this action, cancelled, annulled and terminated any and all relation existing between said corporation and the defendant under or by reason of said Berliner Gramophone Company contract.

Refused. H. B.

X. That in all such cancellations, rescissions and terminations, the defendant herein thereupon concurred, and all of said contract, agreements and arrangements were thereupon terminated and were at an end.

Refused. H. B.

71 XI. That the defendant conducted the litigations against the Berliner Gramophone Company and others, on his own account and for his own benefit and behoof.

Refused. H. B.

XII. That in making application for dissolution, it was the duty of the directors and officers of the National Gramophone Corporation to insert in the schedules as assets and liabilities, all claims and causes of action which they had or might have had under or by reason of any of the matters and things in question in this action.

Found. H. B.

72 XIII. That it was the duty of the directors and officers of said corporation to insert in the schedules filed upon application for its dissolution, a statement of all debts and liabilities which it had incurred, or for which it was absolutely or contingently liable or chargeable, and among such, all claims arising out of the suits brought by the defendant against said Berliner Gramophone Company and others, in case any such obligation existed.

Found. H. B.

XIV. That the failure of the said directors and officers so to insert the rights and obligations alleged in this action to exist by reason of said contracts is some

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Decision.

SUPREME COURT.

NEW YORK COUNTY.

EUGENE V. DALY, as Receiver etc.,
of the National Gramophone
Corporation,

Plaintiff,

against

FRANK SEAMAN,

Defendant.

} Action No. 3.

77 I, Henry Bischoff, the Justice before whom this action was tried on the 19th day of December, 1907, do find and decide as follows:

Findings of Fact:

78 I. The National Gramophone Corporation was organized on or about the 10th day of March, 1899 under the laws of the State of New York, with an authorized capital of \$800,000. for the purpose of manufacturing, selling, leasing, operating and dealing in talking machines or instruments for recording and reproducing sound and for other purposes. Thereafter, and on or about the 13th day of September, 1901, application was made by the directors of the said corporation to the Supreme Court in Westchester County for a voluntary dissolution of the said corporation, and such proceedings were subsequently duly had upon the said application that this plaintiff was by an order of the said court made the 5th day of April, 1902, duly appointed permanent receiver of the said corporation, and thereafter duly qualified and entered upon the performance of his duties as such Receiver, and leave has been duly granted by the Supreme Court to bring this action.

II. On or about the 10th day of October, 1896, the defendant entered into an agreement with the Berliner Gramophone Company, a corporation duly organized under the laws of the State of Virginia, wherein and whereby it was agreed among other things that the defendant should, for a period of years, be the sole selling agent of the said Berliner Gramophone Company, and the said contract further provided in substance that the rights of the defendant thereunder might be assigned to a corporation to be organized by the said defendant, but that such assignment could only be made by the consent in writing of the Berliner Gramophone Company. The said contract dated October 10, 1896, is hereinafter described as the Berliner contract. 79

III. On or about the 4th day of November, 1896, a corporation known as the National Gramophone Company was organized under the laws of the State of New York, for the purpose among other things, of selling talking machines and records, and for the purpose among other things, of taking an assignment of the defendant's said Berliner contract. 80

IV. On or about the 4th day of November, 1896, the defendant made, executed and delivered to the said National Gramophone Company, his certain assignment or contract in writing, whereof the following is a copy:

"KNOW ALL MEN BY THESE PRESENTS,
 "that I, FRANK SEAMAN, residing in Yonkers,
 "County of Westchester, State of New York, party 81
 "of the first part, for and in consideration of the sum
 "of forty-nine thousand eight hundred dollars (\$49,-
 "800), in stock of the National Gramophone Company
 "to me in hand paid at the ensealing and delivery of
 "these presents, by the National Gramophone Com-
 "pany, a corporation duly organized and doing busi-
 "ness under and by virtue of the laws of the State of
 "New York, party of the second part, receipt whereof
 "is hereby acknowledged, have bargained and sold, and
 "by these presents do grant, and convey unto the said

82 "party of the second part, its successors and assigns
 "all my right, title, interest and property, in, to and
 "under a certain contract or agreement, dated the tenth
 "day of October, 1896, executed by and between the
 "Berliner Gramophone Company of Virginia, and my-
 "self, said party of the first part, and all rights and
 "privileges secured thereby; and agree that I will use
 "my best endeavors to secure the recognition by the
 "said Berliner Gramophone Company of said transfer;
 "and that in case such recognition cannot be obtained,
 "the said party of the first part will act with the party
 "of the second part and place in its charge all the busi-
 "ness to be carried out by me under said contract, ob-
 "tain and turn over to said party of the second part
 83 "all goods thereunder which may be advantageously
 "used by said Company, and turn over and deliver to
 "it all profits and advantages whatever which may be
 "derived from said contract with the Berliner Gramo-
 "phone Company,

"TO HAVE AND TO HOLD the said contract and
 "rights so transferred unto the said party of the sec-
 "ond part, its successors and assigns forever.

"IN WITNESS WHEREOF, I have hereunto set
 "my hand and seal this fourth day of November, one
 "thousand eight hundred and ninety-six.

"FRANK SEAMAN (L. S.)"

"State of New York,
 "City and County of New York, } ss.:

84 "On the fourth day of November, in the year one
 "thousand eight hundred and ninety-six, before me
 "personally came FRANK SEAMAN, to me known,
 "and known to me to be the same person described in,
 "and who executed the within bill of sale and acknowl-
 "edged to me that he executed the same."

"F. C. HARDY,

"Notary Public,

"Kings County,

"Cert. filed in N. Y. Co."

and that on or about the said 4th day of November, 1896, in consideration for the said assignment by defendant, the said National Gramophone Company issued to the defendant, who accepted the same, four hundred and ninety-eight shares of its capital stock, of the par value of \$100 each, amounting in all to the sum of \$49,800, which said writing and assignment herein described is the same contract as is referred to in the findings of fact made at the request of the defendant, numbered V, VI and VII. 85

V. Thereafter, and prior to the 1st day of October, 1897, the Berliner Gramophone Company refused to recognize or consent to the said assignment dated November 4th, 1896, of the defendant's rights under the Berliner contract to the said National Gramophone Company. 86

VI. On or about the 1st day of October, 1897, the defendant and the National Gramophone Company entered into an agreement in writing whereof the following is a copy:

"MEMORANDA OF AGREEMENT made and entered into this 1st day of October, 1897, by and between the National Gramophone Company, a corporation duly organized under the laws of the State of New York, party of the first part, and Frank Scamman, party of the second part, WITNESSETH:

"WHEREAS by an agreement dated the 4th day of November 1896, the party of the second part transferred unto party of the first part, certain rights, grants and privileges from the Berliner Gramophone Company, under and by virtue of an agreement executed by and between said company and the party of the second part, dated the 10th day of October, 1896, which transfer it was intended and desired by the parties hereto, should be recognized by said Berliner Gramophone Company, and 87

"Whereas said Berliner Gramophone Company has declined to recognize the party of the first part under

88 "such contract but has continued to bill all goods to
 "the party of the second part, and it being deemed
 "advisable by the parties hereto that such assignment
 "and transfer be modified as herein provided:

"Now this agreement witnesseth, that for and in con-
 "sideration of the sum of one dollar to each in hand
 "paid, the receipt whereof is hereby acknowledged,
 "and of the mutual covenants and agreements herein
 "contained, the parties hereto have agreed as follows:

"The party of the first part shall and hereby does
 "surrender and re-transfer to the party of the second
 "part the aforesaid contract and agreement, and all
 "rights and privileges thereunder.

89 "And the party of the second part does hereby
 "covenant and agree to and with the party of the first
 "part, to sell and deliver to it, any and all gramophones
 "and gramophone goods which it may require in its
 "business, so far and as rapidly, and in such quantities
 "as it shall be possible for him to obtain the same under
 "and by virtue of his said contract, and as shall be
 "required by the parties of the first part, and that such
 "goods be so sold and delivered at the price at which
 "the same shall be received by him, with the addition
 "thereto of one per centum (1%) to such price to cover
 "any expenses of advertising which he may incur, and
 "to compensate him for his risk and attention in carry-
 "ing on such business under said contract.

90 "And it is further mutually covenanted and agreed
 "that while the party of the first part shall purchase
 "from the party of the second part such goods in suffi-
 "cient quantities to satisfy the terms of his said con-
 "tract, that he shall sell to no other person any of
 "such goods, and shall use his best endeavors, so far
 "as his other appointments may permit; to advance
 "the interests of the party of the first part in selling such
 "goods, and that the party of the first part shall use its
 "best endeavors to introduce such goods more gener-
 "ally and extend the sales of same.

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94 X. It was the intent of the parties to the said agreement of October 1, 1897, and to the said agreement of November 4, 1896, at all times after the execution of the said agreements that all profits and advantages which should be derived by the defendant from or under the said Berliner contract of October 10, 1896, should be and become the property of the National Gramophone Company, and of its successor, the National Gramophone Corporation.

XI. On November 4, 1896, the defendant became President and a director of the National Gramophone Company and continued to be such President and a director until the 1st day of October, 1897, on which day he resigned the office of President and the office
95 of director of said company, said resignation being tendered and accepted at the same meeting at which the board of directors of said company authorized the execution of the contract of October 1, 1897. The defendant became the Treasurer of the National Gramophone Company on or about December 21, 1896, and continued to be such Treasurer at all times thereafter until the dissolution of the National Gramophone Company in or about the month of July, 1899. The defendant at the organization of the National Gramophone Corporation, on or about March 10, 1899, became the duly elected Treasurer of said corporation, and continued to be such Treasurer down to about the 14th day of June, 1900, on which date he resigned
96 said office, and his resignation was accepted.

Conclusions of Law:

I make and find the following conclusions of law:

I. During all the times after October 1, 1897, and down to about the 31st day of March, 1899, the defendant held all his rights and privileges under the Berliner contract in trust for the use and benefit of the National Gramophone Company.

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100 privileges which were secured to him and all the profits and advantages which accrued to him under the Berliner contract as trustee for the plaintiff.

VIII. During all the times after the said 5th day of April, 1902, the plaintiff was and now is the beneficial holder of all the rights, interests and privileges which the defendant had or which accrued to him under the said Berliner contract, and was entitled to all the profits and advantages which accrued to the defendant or were derived by him, under and by virtue of the said Berliner contract.

IX. The plaintiff has no adequate remedy at law in the premises.

101 X. The defendant should account for and to the plaintiff for all profits, advantages or monies received by him under or by virtue of, or on account of the Berliner contract, down to and including the date of the beginning of this action.

XI. Interlocutory judgment should be entered according to the course and practice of this court, that the defendant account as aforesaid, and I direct that judgment be entered accordingly in accordance with these findings.

In addition to the foregoing, I make the following findings and conclusions requested by the defendant:

102 I. The proceeding in which the plaintiff was appointed receiver was brought to dissolve the National Gramophone Corporation, and distribute its assets among its creditors.

II. At the time of the bringing of such proceedings, said corporation was insolvent, and unable to pay its debts and obligations in full.

III. The plaintiff herein was appointed receiver for the purpose of winding up the affairs and distributing

the assets of said corporation as provided by the Statutes of the State of New York. 103

IV. On or about the 10th day of October, 1896, the defendant entered into a contract in writing, dated on that day, with the Berliner Gramophone Company, in relation to the manufacture and sale of gramophones and gramophone goods.

V. The defendant executed and entered into a contract in writing with the National Gramophone Company, predecessor in interest of the National Gramophone Corporation, dated on the 4th day of November, 1896, whereby the said Company acquired certain rights in regard to the subject-matter of said Berliner contract. 104

VI. Said contract between said National Gramophone Company and the defendant, embraced and contained all the agreements made and entered into by and between said parties to said contract, at that time.

VII. Said parties acted under the terms and provisions of said contract in their relations and dealings with each other, until the 1st day of October, 1897.

VIII. On or before the 1st day of October, 1897, said parties executed and entered into another contract in writing dated upon that day, in relation to the subject-matter of the said Berliner contract.

IX. Said two contracts embrace all of the contracts, covenants and agreements made or entered into by or between said parties in relation to any rights accruing under the Berliner contract aforesaid, or the subject-matter of the same. 105

X. The said contracts embrace all of the contracts, covenants and agreements made or entered into by or between said parties in relation to the subject-matter of this action.

106 XI. The said contracts fix and define the only right, claim or interest which the said National Gramophone Corporation or the plaintiff, its receiver, has or ever had in, under, or by reason of the contract of October 10, 1896, between defendant and the Berliner Gramophone Company.

XII. On or about the 10th day of March, 1900, the directors of the National Gramophone Corporation passed a resolution, and thereafter caused the defendant to be notified pursuant thereto, that unless he should furnish goods under said contract, said corporation would procure goods for the purposes of its business, elsewhere.

107 XIII. On the 2nd day of April, 1900, the Directors of the National Gramophone Corporation passed a resolution and thereafter caused the defendant to be notified pursuant thereto, that said corporation would procure its goods elsewhere.

XIV. The defendant has been, and always was unable to secure the consent of the Berliner Gramophone Company to the assignment of his rights to the National Gramophone Corporation, as provided by the first contract but endeavored so to do.

XV. The defendant supplied to the National Gramophone Corporation all goods ordered by it under the second contract, so far as he was able to secure the same, under said contract.

108 XVIII. Thereupon the National Gramophone Corporation arranged to obtain its goods from the Universal Talking Machine Company, in which it owned a very large majority of the stock.

XXII. The Berliner Gramophone Company threatened and made preparations to sell its goods to others than the defendant.

XXIII. Thereupon the defendant procured an injunction restraining the said company from so doing.

XXIV. Said injunction was thereafter vacated 109
and set aside, but later restored and reinstated.

XXV. Many suits were brought and maintained
by the defendant against the Berliner Gramophone
Company, the United States Gramophone Company,
Eldridge R. Johnson, and the Victor Talking Machine
Company.

XXVI. Suit was brought in the United States Cir-
cuit Court for the Southern District of New York,
by the Berliner Gramophone Company against the de-
fendant Seaman, to recover \$250,000 damages for the
alleged breach of his said contract.

XXVII. All of said litigations was conducted and
the expense thereof borne exclusively by the defend- 110
ant Seaman.

XXIX. The National Gramophone Corporation
never offered to contribute toward or assume said
expenses or liabilities, or any part thereof.

XXX. Schedules of assets and liabilities were made
by the directors and officers of said corporation in
said dissolution proceedings.

XXXI. No mention was made in said schedules
of the said contracts or suits or of any right or lia-
bility whatsoever in relation thereto or to any of the
same.

XXXII. In no way was the claim in suit or the 111
contractual right out of which it is alleged to arise,
included or mentioned in said schedules.

XXXIII. Subsequently to the appointment of this
plaintiff as receiver of the National Gramophone Cor-
poration, the defendant realized certain moneys upon a
settlement of all the litigations aforesaid.

I. The written contract between the National Gramophone Company and the defendant, dated the 4th day of November 1896, constituted the agreement then made between said parties and involved in this action, and was the measure of their rights and obligations while it continued in force.

V. The defendant in good faith used his best endeavors for the National Gramophone Company and the National Gramophone Corporation to secure in the first instance, the recognition of the conditional assignment made by him, and in the second place, under the second contract to secure and furnish goods as therein provided.

VII. Neither the National Gramophone Company or the National Gramophone Corporation ever secured, by reason of said conditional assignment, any claim or cause of action enforceable by it against the Berliner Gramophone Company.

XII. That in making application for dissolution it was the duty of the directors and officers of the National Gramophone Corporation to insert in the schedules, assets and liabilities, all claims and causes of action which they had or might have had under or by reason of any of the matters and things in question in this action.

XIII. That it was the duty of the directors and officers of said corporation to insert in the schedules filed upon application for its dissolution, a statement of all debts and liabilities which it had incurred, or for which it was absolutely or contingently liable or chargeable, and among such, all claims arising out of the suits brought by the defendant against said Berliner Gramophone Company and others, in case any such obligation existed.

XVIII. That said receiver has failed to proffer or tender, either before action brought, or in this action, the repayment to the defendant of any sums which he has paid out or for which he has become liable by reason of the contracts and litigations made the subject of this action. 115

Dated, April 6th, 1908.

HENRY BISCHOFF,
Justice of the Supreme Court.

Judgment.

At a Special Term of the Supreme Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, Part V, on the 6th day of April, 1908. 116

Present: Hon. Henry Bischoff, Justice.

EUGENE V. DALY, as Receiver etc.,
of the National Gramophone
Corporation,

Plaintiff,
against

FRANK SEAMAN,
Defendant.

Action No. 3.

117

The summons and a copy of the complaint having been duly personally served on the defendant herein, and the defendant having appeared and answered, and this cause having come on for trial before the Court, Honorable Henry Bischoff presiding, at Special Term, Part V, on or about the 19th day of December, 1907, and the plaintiff appearing by Ketcham & Owens, his

118 attorneys, and the defendant appearing by Waldo G. Morse, Esq., his attorney, and the court having heard the allegations and proofs of the parties, and an order having been duly made substituting Owens & Gray, as attorneys for the plaintiff in place of Ketcham & Owens, and the said Justice having on the day of February, 1908, duly filed his decision in writing, stating the facts found and the conclusions of law, and directing judgment to be entered in accordance therewith.

Now, upon the said summons and complaint, the answer, the evidence, the said findings and all the pleadings and proceedings in this action, on motion of Owens & Gray, attorneys for plaintiff, it is

119 Adjudged, that it be referred to John H. Judge, Esq., as referee, to take and state an account of all dealings and transactions between said defendant and the plaintiff, the National Gramophone Corporation and the National Gramophone Company, as to all profits, advantages or moneys had or received by the defendant for, or on account of, or in settlement of the rights, claims or interests of the defendant under a certain contract between the defendant and the Berliner Gramophone Company, which contract bears date October 10, 1896; that for the better taking and stating of such account the defendant Frank Seaman produce and file with the said referee within twenty days after the service of this judgment upon him, an account of all sums, or property, or profits, or advantages received by the said defendant for, or on account of, 120 or by reason of the said Berliner contract, or in settlement of any suits brought by the said defendant to enforce the same, and any and all profits, moneys and advantages, derived by the said defendant under said Berliner contract, and any sums or any money or property received by the said defendant in settlement of said suits, or his rights under said contract, the said account to be stated by items in the form of debtor and creditor columns; that plaintiff be at liberty to sur-

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Exceptions.

SUPREME COURT,

COUNTY OF NEW YORK.

EUGENE V. DALY, as Receiver, &c.,
of the National Gramophone
Corporation,

Plaintiff,

vs.

FRANK SEAMAN,

Defendant.

125

Please Take Notice, that the defendant Frank Seaman, excepts to the decision of Mr. Justice Bischoff, rendered at Special Term herein and filed with the Clerk on the 15th day of April, 1908, in the following particulars, viz:

I. To so much of the First Finding of Fact as sets up that the Receiver was appointed permanent by the order of the Court on the ground that it is against the weight of evidence and there is no evidence to support it.

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II. To the Eighth Finding of Fact, on the ground that it is against the weight of evidence and there is no evidence to support it.

III. To the Ninth Finding of Fact, on the ground that it is against the weight of evidence and there is no evidence to support it.

IV. To the Tenth Finding of Fact on the ground that it is against the weight of evidence and there is no evidence to support it.

V. To the Conclusion of Law numbered I.

- VI. To the Conclusion of Law numbered II. 127
- VII. To the Conclusion of Law numbered III.
- VIII. To the Conclusion of Law numbered IV.
- IX. To the Conclusion of Law numbered V.
- X. To the Conclusion of Law numbered VI.
- XI. To the Conclusion of Law numbered VII.
- XII. To the Conclusion of Law numbered VIII.
- XIII. To the Conclusion of Law numbered IX.
- XIV. To the Conclusion of Law numbered X.
- XV. To the Conclusion of Law numbered XI.
- XVI. To the refusal of the Court to find as re- 128
quested in Paragraph numbered XVI of the requests
submitted by this defendant.
- XVII. To the refusal of the Court to find as re-
quested in Paragraph numbered XVII of the requests
submitted by this defendant.
- XVIII. To the refusal of the Court to find as re-
quested in Paragraph numbered XIX of the requests
submitted by this defendant.
- XIX. To the refusal of the Court to find as re-
quested in Paragraph numbered XX of the requests
submitted by this defendant.
- XX. To the refusal of the Court to find as re- 129
quested in Paragraph numbered XXI of the requests
submitted by this defendant.
- XXI. To the refusal of the Court to find as re-
quested in Paragraph numbered XXVIII of the re-
quests submitted by this defendant.
- XXII. To the refusal of the Court to find as mat-
ter of law, as requested in Paragraph numbered II of
Defendant's Conclusions of Law.

130 XXIII. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered III of Defendant's Conclusions of Law.

XXIV. To the refusal of the Court to find as matter of law, as requested in Paragraph numbered IV of Defendant's Conclusions of Law.

XXV. To the refusal of the Court to find as matter of law, as requested in Paragraph numbered VI of Defendant's Conclusions of Law.

XXVI. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered VIII of Defendant's Conclusions of Law.

131 XXVII. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered IX of Defendant's Conclusions of Law.

XXVIII. To the refusal of the Court to find as matter of law, as requested in Paragraph numbered X of Defendant's Conclusions of Law.

XXIX. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered XI of defendant's Conclusions of Law.

XXX. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered XIV of Defendant's Conclusions of Law.

132 XXXI. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered XV of Defendant's Conclusions of Law.

XXXII. To the refusal of the Court to find as matter of law, as requested in Paragraph numbered XVI of Defendant's Conclusions of Law.

XXXIII. To the refusal of the Court to find as matter of Law, as requested in Paragraph numbered XVII of Defendant's Conclusions of Law.

XXXIV. To the refusal of the Court to find as matter of law, as requested in Paragraph numbered XIX of Defendant's Conclusions of Law. 133

XXXV. To the refusal of the Court to find as matter of law, as requested in Paragraph numbered XX of Defendant's Conclusions of Law.

Dated, April 28th, 1908.

WALDO G. MORSE,
Attorney for Defendant-Appellant,
No. 10 Wall Street,
Borough of Manhattan,
New York, N. Y.

To

Owens & Gray, Esqs.,
Attorneys for Plaintiff-Respondent, 134
No. 189 Montague Street,
Brooklyn, N. Y.
County Clerk,
New York County.

Case.

NEW YORK SUPREME COURT,

SPECIAL TERM—PART V.

EUGENE V. DALY, as Receiver etc., Plaintiff, against FRANK SEAMAN, Defendant.	}	135
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Tried December 19th, 1907, before the Hon. Henry Bischoff, J., sitting in Equity.

136 Appearances:

For the Plaintiff, Messrs. Ketcham & Owens.

For the Defendant, Waldo G. Morse, Esq., Rush Taggart, Esq., of Counsel.

Mr. Ketcham opened the case for plaintiff.

I will offer in evidence the order appointing the plaintiff Receiver, a certified copy.

Mr. Taggart: We object to that as incompetent and irrelevant, the reasons for which will appear later in the evidence.

The Court: How am I to rule unless you present your objection now?

137 Mr. Taggart: We take the objection that this is a bankruptcy proceeding and that under the Bankruptcy Law the exclusive right to take charge of the bankrupt's assets under the Act of Congress, is in the Federal Court.

The Court: I do not see anything of a Bankruptcy proceeding in this action.

Mr. Taggart: It will appear they are nothing but bankruptcy proceedings and the proceeding in which the appointment was made is of that character. The corporation is insolvent, on that ground the receiver has been appointed.

The Court: I shall admit the order.

Exception by Mr. Taggart.

Received and marked Exhibit A.

138 Mr. Ketcham: I offer in evidence a certified copy of the bond given by the Receiver for the discharge of his duties, filed in the office of the Clerk of Westchester County on April 14th, 1902.

Mr. Taggart: We wish this taken under the same objection as part of the same transaction.

Received and marked Exhibit B.

The Court: I admit these papers subject to a reconsideration of my ruling, if the proceedings in which the receiver was appointed are not offered in evidence.

Mr. Ketcham: I am about to offer those proceedings, by the courtesy of my friend, who produces them. I offer in evidence the petition of George A. Robinson and others, in the Matter of the Dissolution of the National Gramophone Corporation of New York, a domestic corporation, dated April 16th, 1901, and verified upon that date, together with the affidavit which accompanied the said petition, of William C. Spencer, Frank A. Crandell, Herman S. Mendelson and William H. Hepper. 139

Mr. Taggart: I renew my objection to this on the ground which I stated, that this appears on its face to be a bankruptcy proceeding, a settlement of the affairs of an insolvent corporation and as such, the Bankruptcy Law of the United States has necessarily superseded the State law and the exclusive jurisdiction is vested in the Federal Court. 140

The Court: No objection is made that the record of the proceedings has not been properly proved?

Mr. Taggart: Oh, no.

The Court: I will admit the proceeding.

Exception by Mr. Taggart.

Mr. Ketcham: Then will it be admitted that Exhibit A was the order entered upon the petition? That there was such a proceeding had, as resulted in the making of the order, Exhibit A?

Mr. Taggart: Yes, without waiving my other objections.

Received and marked Exhibit C.

Mr. Ketcham: I ask for the original contract between Frank Seaman and the Gramophone Company. 141

Mr. Morse: We are unable to produce that contract but we have a printed copy of it, acknowledged October 10, 1896.

Received and marked Exhibit D.

Mr. Ketcham: Also I offer in evidence an assignment by Frank Seaman to the National Gramophone Company, dated November 4th, 1896, acknowledged on that date.

142 Received and marked Exhibit E.

Also I offer in evidence the minutes of the National Gramophone Company, of November 4th, 1896; the authenticity of the minutes is not denied.

Received and marked Exhibit F.

Also I offer in evidence the minutes of the first meeting of the Directors of the National Gramophone Company, held on the 4th day of November, 1896.

Received and marked Exhibit G.

Also I offer in evidence the minutes of the meeting of the Directors of the National Gramophone Company, held December 11th, 1896.

Received and marked Exhibit H.

143 Also I offer in evidence the contract between the National Gramophone Company and Frank Seaman dated October 1st, 1897.

Received and marked Exhibit I.

Also I offer in evidence the minutes of a special meeting of the Directors of the National Gramophone Company, held October 1st, 1897.

Received and marked Exhibit J.

Also I offer in evidence the minutes of the meeting of the directors of the National Gramophone Company, undated, as found at page 29 of the book of minutes.

Received and marked Exhibit K.

144 Also I offer in evidence minutes of the annual meeting of the National Gramophone Corporation, at page 28, for the purpose of establishing date of the Exhibit next last offered.

Received and marked Exhibit L.

Mr. Taggart: We concede that the Gramophone Corporation succeeded to the Gramophone Company.

Mr. Ketcham: That it took up all its rights and duties: is that right?

Mr. Morse: Yes.

Mr. Ketcham: It is also admitted that Mr. Seaman took part in that transfer of rights and duties and consented to and approved of the same.

Mr. Morse: That is immaterial. We will not concede that. 145

The Court: The question is, do you concede that?

Mr. Morse: We concede it to be a fact, that the new company succeeded to all the rights of the other. As to Seaman's part, I am not informed.

Mr. Ketcham: It seems to me it should be essential to show his part.

Mr. Taggart: That does not show he was a trustee in any respect as to matters involved in this litigation.

Mr. Ketcham: That he took part in the reorganization—and respecting the transfer of the rights and duties from the original corporation to the new corporation. Then it is essential to show that he maintained to the second company, the same relation, if it be a trust relation. 146

I also offer in evidence the minutes of the annual meeting of the National Gramophone Corporation, dated January 17, 1899.

Mr. Taggart: I make the same objection to this.

The Court: I shall allow that.

Exception by defendant.

Received and marked Exhibit M.

Mr. Ketcham: Also I offer in evidence the minutes of the special meeting of the Directors, held on January 31st, 1899.

Mr. Taggart: On the same subject?

Mr. Ketcham: Yes.

Mr. Taggart: The same objection.

Received and marked Exhibit N. 147

Mr. Ketcham: Also I offer in evidence the minutes of the special meeting of the stockholders, held February 16th, 1899.

Mr. Taggart: On the same subject?

Mr. Ketcham: Yes.

Mr. Taggart: The same objection.

Received and marked Exhibit O.

148 Mr. Ketcham: Also I offer in evidence the minutes of the meeting of the Board of Directors of the National Gramophone Company, held March 31st, 1899, on the same subject.

Mr. Taggart: That is open to the same objection. Received and marked Exhibit P.

Mr. Ketcham: Also I offer in evidence the certificate of incorporation of the National Gramophone Company, dated October 19th, 1896.

The Court: I will take the evidence.

Exception by Mr. Taggart.

Received and marked Exhibit Q.

Mr. Ketcham: Here is a commission returned to the Clerk of the Court. These are interrogatories propounded to FREDERICK M. LEONARD.

149 Mr. Ketcham reads as follows:

Q. State your name, residence, occupation and business address? A. Frederick N. Leonard: residence, 4243 Walnut Street, Philadelphia; occupation, lawyer; business address, 119 S. 4th Street, Philadelphia.

Q. If you say you are an attorney-at-law, say how long you have been such, and where you have practised? A. I was admitted to the Philadelphia bar in 1882, and have practiced in Philadelphia and in the Circuit Courts of the United States in different parts of the country and in the Supreme Court of the United States.

150 Q. Look at the paper now shown you, being Plaintiff's Exhibit A, attached to this commission, a copy of a contract bearing date October 10, 1896, between Frank Seaman and the Berliner Gramophone Company, (being a copy of Exhibit D, in this action); and say whether or not you have ever seen an original agreement, of which it is a copy? If you say you have, state whether or not it is a true copy of such original agreement? A. I have looked at the contract mentioned in the third interrogatory, and it appears to me to be a copy of an agreement with which

I am well acquainted, but whether it is true copy or not I will not undertake to say, for I have no opportunity to compare it. 151

Q. Have you ever met the defendant, Frank Seaman? A. Yes.

Q. If you say you have met the defendant, state whether or not you have ever had any conversation or dealing with him with respect to the settlement of his rights or claims against the Berliner Gramophone Company, or any other person or corporation under said ageement, Plaintiff's Exhibit A, (Exhibit D, in this action), or with respect to the settlement or discontinuance of any suits brought by him against any person for any cause of action arising out of that agreement? A. Yes, I have here a copy of an agreement, dated the third day of February, 1903, between Frank Seaman, above mentioned, the Berliner Gramophone Company, the U. S. Gramophone Co., the Victor Talking Machine Co., and Eldridge R. Johnson, called a "Settlement Agreement" and a copy of an agreement dated the same day between Frank Seaman, above mentioned, and the Consolidated Talking Machine Co., of America, called a "Put and Call Agreement," which together operated to effect a settlement and discontinuance of all suits brought by Frank Seaman against any person for any cause of action arising out of that agreement, dated October 10, 1896. 152

Q. If you say you have talked or dealt with the defendant with respect to the settlement or release of his rights under that agreement, or of any such lawsuits, state whom, if any one, you represented, in that respect or for whom, if any one, you acted? A. I represented all the corporation parties to the agreement mentioned in my answer, namely: The Berliner Gramophone Co., The United States Gramophone Co., the Victor Talking Machine Co., and the Consolidated Talking Machine Co., of America, and I also represented Eldridge R. Johnson. 153

154 Q. If you say you talked or had dealings with the defendant with respect to certain lawsuits, please describe these suits, giving their titles, the names of the Courts in which they were brought and give particulars sufficient for their identification? A. I now offer as a part of my testimony, copies of the "Settlement Agreement," and the "Put and Call Agreement," above mentioned in my answers, and request that they be copied and read as a part of this answer.

The "Settlement agreement" contains a recital in which, in general terms, is described all the litigations to which that settlement referred. I had no talk or dealings with the defendant with respect to any other litigations except that mentioned in the recital above described, either specifically or in general terms, and my talks and dealings with the defendant were practically confined to the execution of the above mentioned "Settlement Agreement" and the "Put and Call agreement."

155

Settlement Agreement produced and read as follows:

156 THIS AGREEMENT made the 3rd day of February, A. D., 1903, between FRANK SEAMAN, of NEW YORK, party of the first part, and the BERLINER GRAMOPHONE COMPANY, a corporation of the State of Virginia, the UNITED STATES GRAMOPHONE COMPANY, a corporation of the State of West Virginia, the VICTOR TALKING MACHINE COMPANY, a corporation of the State of New Jersey, and ELDRIDGE R. JOHNSON, of Philadelphia, parties of the second part. WITNESSETH THAT

WHEREAS, on or about the 10th day of October, A. D., 1896, the said Berliner Gramophone Company entered into an agreement dated the 10th day of Oc-

tober, A. D., 1896, relating to gramophones and gramophone goods, with the said Frank Seaman. 157

AND WHEREAS numerous actions and suits are pending to which the said Frank Seaman is a party and to which one or more of the said parties of the second part are also parties, including litigation in the Circuit Court of the United States for the Western District of Virginia and in the United States Circuit Court for the Southern District of New York, between the said Frank Seaman and the said Berliner Gramophone Company; also litigation in the Circuit Court for the United States for the Northern District of West Virginia, between the said Frank Seaman and the said United States Gramophone Company; also litigation in the Circuit Court for the District of New Jersey, between the said Frank Seaman and the said Victor Talking Machine Company, and also litigation in the Eastern District of Pennsylvania, between the said Frank Seaman, and the said Eldridge R. Johnson; and there is also pending in the Circuit Court of the United States for the Western District of Virginia litigation between Ford and Smith and the Berlinger Gramophone Company; and in the litigation above mentioned the said parties and others are joined as parties litigant in various ways, and there are also other actions and suits pending in the said jurisdictions and elsewhere to which two or more of the parties to this agreement are in one way or another parties; 158

AND WHEREAS a settlement of all disputes has this day been effected between all the parties hereto on the terms hereinafter stated; 159

NOW THEREFORE, in consideration of the sum of Thirty-Five Thousand Dollars (\$35,000) lawful money of the United States of America and also Thirty-Five Thousand (\$35,000) Dollars in full paid and non-assessable preferred capital stock of the Consolidated Talking Machine Company, of America, as well as other valuable considerations, the receipt of

160 all of which is hereby acknowledged, the said Frank Seaman does hereby covenant and agree to and with all of the said parties of the second part, and each of them, to cancel, and with the concurrence of the said Berliner Gramophone Company, hereinafter expressed, does hereby cancel, rescind, abrogate and make void, the said contract, dated the 10th day of October, A. D., 1896, between the said Berliner Gramophone Company, and the said Frank Seaman, and does hereby release the said Berliner Gramophone Company, its successors and assigns, from all claims on account thereof.

161 And for the considerations aforesaid the said Frank Seaman does hereby remise, release, and forever discharge, all of the said parties of the second part, and each of them, their successors, heirs, executors and administrators, of and from all and all manner of actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or equity which against the said parties of the second part, or any of them, he ever had, now has or which his heirs, executors, administrators or assigns, or any of them, hereafter can, shall or may have for all by reasons of any causes, matter or thing whatsoever from the beginning of the world to the date of these presents.

162 And the said Berliner Gramophone Company in consideration of the premises does hereby concur and join the said Frank Seaman in cancelling, rescinding, abrogating and making void the said contract, dated the 10th day of October, A. D., 1896, between the said Berliner Gramophone Company, and the said Frank Seaman.

And in like manner and in consideration of the premises the said parties of the second part do hereby remise, release and forever discharge the said Frank Seaman, his heirs, executors and administrators of and from all and all manner of actions and causes of actions, suits, debts, dues, accounts, bonds, covenants,

contract, agreements, judgments, claims and demands
 whatsoever in law or equity which against the said
 Frank Seaman they ever had, now have, or which
 their successors, heirs, executors, administrators or as-
 signs, or any of them hereafter can, shall or may have
 for or by reason of any cause, matter or thing whatso-
 ever from the beginning of the world to the date of
 these presents. 163

And in consideration of the premises as well as other
 mutual considerations, the receipt of which is hereby
 acknowledged, it is mutually covenanted and agreed
 by and between the parties hereto, that all actions
 or suits to which the said Frank Seaman and any one
 or more of the parties of the second part, are parties,
 shall forthwith be discontinued, dismissed and ended
 by the plaintiff or complainant herein, and that each
 party shall pay its own costs and expenses of suit—
 the said Frank Seaman hereby undertaking to pay
 all the costs of the Berliner Gramophone Company,
 and the United States Gramophone Company in ac-
 tions or suits in which he has made them parties plain-
 tiff or complainant with himself, and also hereby un-
 dertaking to cause the said suit of Ford and Smith
 against the Berliner Gramophone Company to be dis-
 missed and to pay the costs and expenses of the said
 Ford and Smith therein: 164

AND IT IS FINALLY MUTUALLY COVE-
 NANTED AND AGREED, by and between the par-
 ties hereto that they and each of them will sign, seal
 and deliver and cause to be filed all instruments in
 writing and do all other acts necessary or proper to
 carry fully into effect the terms of this settlement. 165

WITNESS the following signatures and seals, the
 day and year first above written.

WALDO G. MORSE.

Solicitor.

FRANK SEAMAN

(Seal)

BERLINER GRAMOPHONE CO. (Seal)

By FREDERICK M. LEONARD.

Attorney.

166

UNITED STATES GRAM. CO. (Seal)

By FREDERICK M. LEONARD,
Attorney.

VICTOR TALK. MACH. CO. (Seal)

By FREDERICK M. LEONARD,
Attorney.

ELDRIDGE R. JOHNSON. (Seal)

By FREDERICK M. LEONARD,
Attorney.

Signed, sealed and delivered in the presence of
 HORACE G. WILLIAMS.
 CHAS. McARTHUR.
 B. H. MILLER.

167

"PUT AND CALL" Agreement between FRANK
 SEAMAN and CONSOLIDATED TALKING
 MACHINE COMPANY OF AMERICA, dated
 Feb. 3, 1903.

This agreement made the 3rd day of February,
 1903, between FRANK SEAMAN, of New York,
 party of the first part, and the CONSOLIDATED
 TALKING MACHINE COMPANY OF AMERI-
 CA, a corporation of the State of New Jersey, party
 of the second part.

WITNESSETH THAT:

168

Whereas, in a settlement this day made between the
 said Frank Seaman, and the Berliner Gramophone
 Company, The United States Gramophone Company,
 the Victor Talking Machine Company and Eldridge
 R. Johnson, that said Frank Seaman has received pre-
 ferred stock of the said Consolidated Talking Machine
 Company of America, amounting at par to \$35,000.
 NOW THEREFORE, in consideration of One Dol-
 lar, and for other valuable consideration, the receipt
 of which is hereby acknowledged, it is mutually cove-

entered and agreed by and between the said Frank Seaman and the said Consolidated Talking Machine Company of America that any time within one year from the date hereof, on sixty days call in writing by either party, the said Frank Seaman will sell, and the said Consolidated Talking Machine Company of America will purchase for cash \$25,000 of the said preferred stock or any part thereof at 75% of its par value. 169

In Witness Whereof, the said Frank Seaman has hereunto set his hand and seal, and the said Consolidated Talking Machine Company of America has caused this agreement to be signed in its name by its President and sealed with its corporate seal the day and year first above written.

FRANK SEAMAN

(Seal)

CONSOLIDATED TALKING MACHINE COMPANY OF AMERICA,

By Charles Adamson.

President.

(Corporate Seal.) 170

Signed, sealed and delivered

in the presence of:

Charles McArthur,

Waldo G. Morse,

Horace C. Williams.

(Endorsed) : Certificate subject to above agreement as follows:

174—100 shares

175—100 shares

176— 50 shares

FRANK SEAMAN. 171

Also reads:

Q. State whether or not you have ever paid any money or delivered any stock or property to the de-

172 fendant, and whether you received from him any consents, papers, releases, receipts or other documents having particular reference to the settlement of his rights under the said agreement of October 10, 1896, or of any law suits based thereon? A. Yes. The settlement agreement stated that upon the execution of it the defendant, Frank Seaman, received \$35,000 lawful money of the United States of America, and \$35,000 in full, paid and non-assessable preferred capital stock of the Consolidated Talking Machine Company, of America. On the execution of this agreement, I paid the cash and delivered said certificates for the stock above mentioned to the defendant, Frank Seaman.

173 Q. If you say you did pay the defendant any money or delivered to him any property, state fully how much money you paid him; in what form it was paid what property you delivered to him state when and where and in whose presence, the said payment or delivery took place, state what papers, if any, were delivered by you to the defendant, or by the defendant or any one on his behalf or in his presence to you on said occasion; state what was said by you or any one else in the defendant's presence, and what was said by the defendant, and generally describe the whole transaction? A. I have already answered in part. I paid the defendant \$35,000, in cash and \$35,000 in stock of the Consolidated Talking Machine Company of America, as described in the settlement agreement.

174 The money was paid to the defendant in cash—bank notes—settlement was made in Mr. Seaman's office in New York. I went over to New York expressly for that purpose. I observe at the foot of the settlement agreement that the witnesses present were Waldo G. Morse, Horace G. Williams, Charles McArthur and B. H. Miller. I know that Mr. Morse and Mr. Williams were present, and I presume that Mr. McArthur and Mr. Miller were also present, but I do not remember them. Mr. Morse was Mr. Seaman's lawyer, and

Mr. Williams was the mutual friend through whom Mr. Seaman negotiated the settlement with me. The settlement was made on the 3rd day of February, 1923, as stated in the papers. The papers delivered were the "Settlement agreement" and the "Put and Call" agreement above mentioned. They were executed in several parts. The Settlement Agreement in five parts, and the Put and Call Agreement in duplicate, and one of the original parts of each agreement was delivered to the defendant, Mr. Seaman. I do not recall anything that was said on that occasion. The settlement occupied only a few minutes, and very little was said, excepting with regard to the signing of the papers and the paying over of the considerations. My recollection is that it did not occupy more than twenty minutes or half an hour at the outside. The settlement was negotiated by Mr. Williams for Mr. Seaman. Several propositions were brought to me from Mr. Seaman, by Mr. Williams and I accepted the proposition of settlement described in the above papers, as finally presented in that way. Mr. Williams was Mr. Seaman's agent in the negotiations.

Q. If you say in answer to the foregoing interrogatory, that you delivered or paid a check or draft or order for the payment of money to the defendant at any time, state by whom such check or draft or order was signed, and if it is now under your control or in your possession, produce it, and annex it or a copy to this deposition. If you have not said check, draft or order in your possession or under your control, state if you know where the same, if any, now is. If you have seen such a check, draft, or order, and it is not in your possession or under your control, or if you cannot find it, state what search you have made for it, and state why you do not produce it, and describe its contents to the best of your recollection? A. I did not pay by check, or draft, but with cash, as above stated.

178 Q. State any other conversations or transactions you have had with the defendant personally, with respect to the settlement of his rights or claims under contract of October 10, 1896, being Plaintiff's Exhibit A, and state fully what was said to or by the defendant or in his presence at any such conversation giving the dates and places of any of them, and the persons present, and describe the whole of each such occasion, to the best of your recollection. A. I have fully answered that in my previous answers. I have never had any other conversations or transactions with the defendant or any one representing him than those above described.

179 Q. State if you have ever had any conversation with any person, representing or claiming to represent the defendant with respect to the settlement of the defendant's rights or claims under the contract of October 10, 1896, Plaintiff's Exhibit A, or the defendant's claims against the Berliner Gramophone Company, or any of its successors in interest. If you say you have had such conversations, give the names of such persons and places, and dates of such conversations, and state fully what was said and done on each occasion by each person present, describing each occasion fully? A. I never had any other conversations or transactions with the defendant or any one representing him than those above described.

180 Q. Have you ever written letters to or received letters from the defendant with respect to his rights, and claims under the said agreement of October 10, 1896. If you say you have, please annex the originals of such letters or copies thereof. If you do not produce the originals state why and if you have not the originals or copies thereof, state what search you have made for them, whether or not they are lost or not, under your control and custody, and then state the substance of such letters of which you have not copies or originals. A. I had correspondence with the defendant prior to the beginning of the litigation above

mentioned but most of the correspondence, although dictated by me was in the name of the Berliner Gramophone Company, and all of it as far as I can recollect is exhibited in the printed records of that litigation. After the litigation began, I exchanged numerous letters with Mr. Waldo G. Morse, as the defendant's counsel, but I cannot recall that I ever exchanged any letters with the defendant in regard to the settlement. My dealings were all personal interviews with Mr. Williams as his agent. 181

Q. State whether you have ever had any correspondence with any person claiming to represent the defendant, with respect to the settlement of his rights under the agreement of October 10, 1896, Plaintiff's Exhibit A. If you say you have had such correspondence, please produce all such letters from or to any such persons, or copies if you have not the originals explaining why the originals are not produced, and what search you have made for them or if they are not under your custody or control, and then state the substance of them, to the best of your recollection. 182

A. I had correspondence with the defendant prior to the beginning of the litigation above mentioned, but most of the correspondence, although dictated by me, was in the name of the Berliner Gramophone Company, and all of it, as far as I can recollect, is exhibited in the printed records of that litigation. After the litigation began, I exchanged numerous letters with Mr. Waldo G. Morse, as the defendant's counsel, but I cannot recall that I ever exchanged any letters with the defendant in regard to the settlement. My dealings were all personal interviews with Mr. Williams, as his agent. 183

Q. If it appears from the answers to the foregoing interrogatories, or from the exhibits introduced, that the defendant received any stock of any corporation in or on account of the settlement of his rights or claims under the agreement of October 10, 1896, state, if you know, whether the defendant thereafter re-

184 ceived anything from any person or corporation for the said stock, and if so, how much, and the date and place of such receipt, giving the whole transaction, so far as you know it? A. Under the "Put and Call Agreement," the defendant was entitled to have \$25,000, of his preferred stock in the Consolidated Talking Machine Co., of America, purchased from him the Consolidated Talking Machine Co., of America, at seventy-five per cent, of its par value. The defendant in due time called for the cash, and \$25,000, in his stock was purchased and paid for by the Consolidated Talking Machine Co., of America, at seventy-five per cent, of its par value, as stated in the "Put and Call" Agreement. The payment was made to the defendant, Frank Seaman. I am not able to say whether the money was paid by the Consolidated Talking Machine Co., of America, or by its successors, the Consolidated Talking Machine Company. It was paid by one of those two corporations.

185

Q. Do you know of any payments of money or property to the defendant, by any person other than yourself, in settlement or on account of his rights and claims under the said agreement, or in settlement of any suits brought thereunder. If so, give all the particulars, names, dates, places, amounts and terms of such payments, to the best of your knowledge? A. I do not know.

186 Q. State anything else you know material to this case or to the subject-matter of these interrogatories as fully and at large as if you had been specifically interrogated with respect thereto. A. (With respect to the general interrogatory, Mr. Morse asks the witness to state the facts with reference to the cessation of active business by the Berliner Gramophone Company, if it has ceased to manufacture and sell goods and when such manufacture and sale terminated.) A. The litigation brought by Frank Seaman against the Berliner Gramophone Company started with a preliminary injunction which entirely suspended the ac-

activities of the Berliner Gramophone Company during the entire period of the litigation, for until the settlement above mentioned was made, the injunction in one form or another continued in force. 187

Q. Have you any interest in this case or are you related to any of the parties? A. No.

It is conceded, that at all times after December 21st, 1896, until the dissolution of the National Gramophone Company, Mr. Frank Seaman, the defendant, was treasurer of the National Gramophone Company, and that during all the times from the organization of the National Gramophone Corporation, down to about the month of June, 1900, the defendant was the treasurer of the National Gramophone Corporation. 188

Mr. Ketcham: I desire to offer in evidence the testimony of Frank Seaman, the defendant here in the proposed case on appeal in the action of Mackay vs. Seaman certain statements then made by Mr. Seaman: they have been proposed as part of the record on appeal as statements that he had made upon the trial.

Mr. Ketcham (reading), "I don't recall that it was arranged between us and them, before I transferred the contract for which I received the \$49,800 of stock, that there should be after the issue of the stock a sale of the property for \$15,000. The sale for \$15,000 was first spoken of before the issue of the \$49,800 of stock to me; probably before. That it was talked of between me and Mr. Bentz and Mr. Owens or one of them, that there should be first an issue of the stock to me to the amount of \$49,800 in exchange for our contract, and that after that was done I should sell the Company these assets for \$15,000. I don't recall the particulars of that. I don't recall at which time it took place. That it was before the issue of 189

190 the stock that the fifteen thousand dollar sale was talked about. I am not positive about, but that is my impression: that is my best memory.

"I don't recall that shortly after that it was discovered by me that I had transferred to the company nothing in consideration of the issue of the \$49,800 of stock. It was discovered either with that company or its successor—which was the two hundred thousand dollar Company."

Mr. Taggart: I move to strike out all of that, because it is cross-examination of Mr. Seaman as to what he did not recall. He has no recollection of that.

191 Mr. Ketcham: I suppose that is negative testimony and that disposes of it. I ask to read further, and I will agree that it may be stricken out if the Court so rules.

Mr. Taggart: I have nothing further to say then.

Mr. Ketcham: (reading): "Or rather the Berliner Company objected when it was notified of this transfer of the contract and called my attention to the fact that there was a clause in the contract which prevented my transferring that contract to a third party without their written consent."

192 (Reading): "That transfer was cancelled and a contract was entered into with the company. I discovered that the Berliner Company objected to the transfer when they were notified that it had been made. This matter was discussed, as I recall it, with the Berliner Company and they—they called my attention to the fact that they objected to the transfer. I had never obtained their consent to the transfer, not their written consent. And after attempting to make the transfer, I discovered that there had been nothing transferred by that effort of transfer."

Mr. Taggart: I move to strike that out as
the opinion of the witness. 193

Motion denied. Exception.

Mr. Ketcham (reading): "I should say yes. That is a matter of record. Thereupon, I and the company did make an arrangement by which our attempted transfer was cancelled, and I was then put back into the position, momentarily, that I had the stock and that the transfer that I had made was to be disregarded, but was to be followed by the best that I could do in the way of putting in a substitute for that transfer. I believe that was it."

Mr. Taggart: I move to strike that out as
the opinion of the witness as to the effect of
the arrangement. 194

Motion denied. Exception.

Mr. Ketcham (reading): "And thereupon I made my contract with the company, giving them, so far as I could, my promise to do for them all the things that the Berliner Company had promised to do for me."

Mr. Taggart: I object to that and I move
to strike it out as an attempt to interpret a
written agreement.

Motion denied. Exception.

Mr. Ketcham (reading): "That was substantially right; that contract with the National Gramophone Corporation, or the Company, ought to be with the National Gramophone Papers. I must have had a copy of it and I have looked for that; I believe I have. I have looked for everything I have been called upon to look for. The contents of that contract were substantially such as were set forth in the resolution with respect to it which I read I should say." 195

Mr. Taggart: I move to strike that out on
the same grounds.

Motion denied. Exception.

196

The Court: It is noted that this testimony is read subject to a motion to strike out. When the motion is made, that is the end of it.

Mr. Taggart: This is also objected to, as incompetent immaterial and hearsay.

The Court: I understand your objection was as to the materiality and relevancy?

Mr. Taggart: Yes.

PLAINTIFF HERE RESTED.

197

Mr. Taggart: I move to dismiss the complaint herein on the ground that no cause of action has been proved as against the defendant Seaman: first, upon the ground that no trust relation is shown with respect to the moneys received in the settlement of the case.

Second: It is not proven that this money was received on account of the considerations named in the complaint alone, but included a vast number of other considerations named in the complaint alone, but included a vast number of other considerations, shown by the agreement, and the portion that is known to result from the amount of the Berliner Company, is not separated and therefore there is no basis for the action that is sought.

198

The Court: I will deny the motion for a dismissal at present, and you may renew it when both sides rest.

Exception by Mr. Taggart.

The defendant to establish the contention upon his part introduced the following evidence: 199

ORVILLE D. LA DOW, called as a witness on behalf of the defendant, being duly sworn testified as follows:

Direct-examination by Mr. Taggart:

I was secretary and general manager of the National Gramophone Corporation until its dissolution and had been the president and general manager of the National Gramophone Company.

I call your attention to the reading of the minutes of the meeting of March 10th, 1900: "The secretary made a general statement as to the supply of gramophones and Mr. Robinson thereupon offered the following resolution which was unanimously agreed to: 200

"That the Executive Officers of this corporation are hereby authorized to make the necessary arrangements with the Universal Talking Machine Company for the placing of their type of talking machines on the market, providing Mr. Seaman, for any reason, finds himself unable to comply with his contract as to the furnishing of gramophones to this corporation or to deliver such goods as this corporation may require to fill its orders."

I offer the resolution with the minutes of the meeting of March 10th, 1900.

Received and marked Exhibit 1. 201

There had been difficulty experienced by the Gramophone Corporation in getting gramophones for the supply of the market prior to the time of that resolution. Prior to March 10, 1900, I told Mr. Seaman several times that unless some arrangement could be made for the supply of the goods necessary to carry on the business of the corporation that the company would certainly take action looking to the cancellation of our relations with them.

202 Following the action of March 10th. I told Mr. Seaman that the directors had taken the very action which I had anticipated; that they had passed a resolution looking to a cancellation of his contract with us and that unless he was able to do something to relieve the situation, our relations would certainly be terminated.

The failure to get gramophones had the effect of preventing the company from doing its business of filling orders.

Mr. Taggart: I now offer the minutes of the meeting of the Directors of the National Gramophone Corporation, under date of April 2nd, 1900.

203 Received and marked Exhibit 2 and read to the Court.

204 Following that resolution I told Mr. Seaman that the action which I had anticipated had been taken; that the Directors had passed a resolution which terminated our relations. Subsequently to that conversation I communicated with him in writing, in substance that the Directors had passed a resolution authorizing the officers of the company to get its goods elsewhere, and that therefore, officially I was obliged to notify him that our relations were terminated. I last saw that letter among the papers of the Receiver, somewhere, I think in Beach Street, in this city, in a warehouse at the time I was examining the papers for other matters, the date of the letter was in April, 1900, and the date when I last saw it was something like four years ago after the receivership had commenced. I was examining the receiver's papers with reference to any papers or correspondence between the National Gramophone Company and the Universal Talking Machine Company, with reference to the use of the word, "Zonophone."

Q. This letter, you may state whether that was mailed to Mr. Seaman, if you know?

Mr. Ketcham: I object to that. Let us see 205
what Mr. La Dow did with the letter. If Mr.
Seaman is going to testify that he received the
letter, then I shall not make it difficult for you.

Mr. Taggart: He did receive the letter.

Mr. Ketcham: Then there is no use object-
ing to that, nor in your proving it.

Mr. Taggart: Then I will pass on in that
view.

Attached to the copy of the letter dated in April,
there was pinned another letter, dated in March, in
which I carried out my warning (my previous warn-
ing which I had communicated to him verbally); in
writing and in some official form. Subsequent to the
sending of this letter and this talk with Mr. Seaman 206
that I have described, the National Gramophone Cor-
poration, was marketing goods which it was getting
from the Universal Talking Machine Company, a
rival to the Berliner Company, making similar goods
for similar purposes. The Universal Talking Ma-
chine Company manufactured under different patents
and did not have any connection with the Berliner
Company. Subsequent to the cessation of Mr. Sea-
man's connection with the National Gramophone Cor-
poration in June, 1900, as treasurer, he did not have
any connection with its business excepting as a stock-
holder of the Corporation. After this cessation, I
heard of litigation on the part of Seaman against the
Berliner Gramophone Company, and other parties. In 207
respect to the Berliner goods after the notice under
the resolution of April 2nd, 1900, Mr. Seaman adver-
tised the Berliner goods for sale. He opened an of-
fice for the sale of those goods and I think sold some
goods and operated in that sense independently of the
National Gramophone Corporation. He had rooms
on the 10th floor of 874 Broadway. About the time,
or subsequent to April, Mr. Seaman moved his of-
fices from the third floor of the building which was
occupied by the National Gramophone Corporation to

208 the eighth floor of that same building. I am not positive about that date. The offices of the National Gramophone Corporation and its place of business were on the third floor, and so had been to my knowledge since 1897. Mr. Seaman's office had been there also during that time. Sometime after this I learned of those litigations that Mr. Seaman was conducting against the Berliner Company and other companies. I went to Harrisonburg two or three times with reference to those suits. I gave to the attorneys in the cases for the plaintiff, such information as they desired with reference to what the Berliner Gramophone Company had done, or failed to do, with reference to carrying out the contract with Mr. Seaman, of October 10th. Mr. Seaman paid my expenses for that trip. The
209 National Gramophone Corporation had nothing whatever to do with my going. The directors of the company discussed the matter of these resolutions of March and April, 1900, prior to the passage of either of them. It was stated in the board several times and at several meetings, that unless the Gramophone Corporation could find some way to obtain us goods, it could not continue in business. In connection with the discussion of those resolutions, and as to the possibility of going on with Seaman and going on with the Universal Talking Machine Company, at the same time, it is my recollection that our attorney, Mr. Morse stated in open Board—in fact I am positive that he did—that it would be inconsistent for us to
210 go on through the Universal Talking Machine Company, and at the same time continue relations with Mr. Seaman under the Berliner contract, for the reason as he stated that we would be subject to injunction by the Berliner Company.

CROSS-EXAMINATION by Mr. Ketcham:

The failure to get the goods which I have described, consisted in fact that our orders to Frank Seaman

were not filled. The situation that we could not, or did not have our orders filled upon our requests made to Mr. Seaman for goods continued from the beginning of the cessation of his deliveries to the present time. He stopped delivering goods to us upon our orders and stopped permanently. It had been from the first of the year 1900, that we did not get goods from Mr. Seaman upon our orders addressed to him all before we passed the resolutions which I have described in March, 1900, and April, 1900. The filling of orders addressed to him was a subject of conversation between Mr. Seaman and myself a good many times. In those conversations, I asked him to make his best efforts to supply the goods which we had previously had from the Berliner Company through him and stated that if he did not make his best efforts, we would have to look elsewhere, to succeed. He said to me that he would endeavor to get the goods from the Berliner Company, and showed me a great deal of his correspondence.

He told me that he had tried and he was trying to get the Berliner Company to deliver the goods to the Gramophone Corporation, upon the orders of the Corporation addressed to him.

It was subsequent to April 2nd, that Mr. Seaman opened the office of his own for the sale of Berliner goods and commenced his advertisement of them. I cannot exactly remember when it was. I think that no Berliner goods had been delivered down to the time of the opening of this office by him, I don't know of my own knowledge that Mr. Seaman sold goods. When I stated that he advertised the Berliner goods for sale and opened an office for the sale of these goods, I referred to the goods that had come into Mr. Seaman's possession, either through the Berliner Company contract, that he received such goods, or goods that may have come into his possession otherwise, that were made sometimes by the Berliner Gramophone Company. I do not know whether or not he had

214 advertised goods which he had obtained from the Berliner Company after the 1st of January, 1900. I remember being in his new office on the 8th floor very frequently. He remained in that office, some years, and I was frequently there for several years. I do not know how long he continued to advertise—the Berliner goods, the office for the sale of those goods. I saw those goods at his office. There were not so many machines as records, as I now remember. I should say there were several thousand of records in the office at that time. The records which I saw there were among the goods which I call the Berliner goods. They were made by the Berliner Company, had their stamp on them and were of the kind which was covered by the contract between Mr. Seaman
215 and the Berliner Company.

Q. Were those goods delivered to Mr. Seaman by the Gramophone Corporation? A. I think that they were, but I am not positive about that.

Q. Do you know anything about it? A. I do not.

Q. One way or the other? A. I could not say positively.

Prior to his institution of his office on the 8th floor, Mr. Seaman had occupied a part of the floor with the Gramophone Company, and the Gramophone Corporation. Outside of the resolutions and the discussions which I have spoken of, my oral communications with Mr. Seaman and my letters to him of which I do not recall that there was anything else done with respect
216 to the contract between Mr. Seaman and the Gramophone Corporation. I do not recall anything more at this moment, from my best memory.

After the National Gramophone Corporation was formed it never received any goods from the Berliner Company. It received its goods from Mr. Seaman. It gave no orders to the Berliner Company. It gave its orders for goods to Mr. Seaman. In this conversation which I had with Mr. Seaman, to which my attention was called on the cross-examination, respect-

the receipt of goods. Mr. Seaman never refused in any way to deliver goods which he had received from the Berliner Company. 217

By Mr. Ketcham:

Mr. Seaman never refused from the 1st of January, 1900 or thereabouts, he did not furnish any goods to the company. The company frequently asked him to do so.

By Mr. Taggart:

He never refused. The difficulty as explained to me by him, was his inability to get the goods from the Berliner Company. I don't remember any goods being delivered by Mr. Seaman to the Gramophone Corporation immediately prior to March, 1900. 218

By Mr. Ketcham:

I don't think there were any goods delivered by Mr. Seaman to the Gramophone Corporation during any part of the year 1900, that from the first of that year, onward, down to and through the month of May, no goods of the Berliner Company were delivered by him to the Gramophone Corporation. That is my best recollection. I cannot tell for sure. My only uncertainty is in respect to when the trouble began. In regard to the trouble which I have spoken of on direct-examination, that began and from then onward no goods were delivered by him to the Gramophone Corporation, I think. 219

WALDO G. MORSE, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination by Mr. Taggart:

I was one of the directors of the National Gramophone Corporation for a short time. I was at the

220 meetings of March and April, 1900. I was counsel for the company and attended all the meetings as such and at that time for a brief period was a director. At those meetings, as upon prior occasions a discussion arose as to the supply of goods obtainable by the company. A report was made by Mr. La Dow as to the extent to which we could not get goods and the efforts made to obtain them. The source of supply through the Universal Company was discussed and my opinion was asked in regard to it legally. The directors asked on those occasions, as they had been asking for some time before, whether they could go on and sell the Zonophone, so-called the product of the Universal Company and go on with the other business when they could get goods. I told them that

221 they could not, in my opinion, that the Berliner Gramophone was a patented machine, and that the contract with Mr. Seaman provided for his exclusive handling of that machine and prevented us from dealing with any other kind and that if the National Gramophone Corporation should continue taking all the goods which Seaman could get and dealing with the others, in my opinion, it would put itself in such privity with Mr. Seaman, the contracting party with the Berliner Company, that a preliminary injunction would issue if they attempted to put concurrently another machine on the market. The zonophone was substantially the same as the gramophone in its construction. This discussion was repeated.

222 Following the meeting of April 2nd, 1900, I remained the counsel of the corporation but I was not a director; I was solicitor of record in all of the cases against the Berliner Gramophone Company and others named. The two volumes which you have before you contain the printed records on appeal in those litigations and the unprinted papers with them are the papers upon motions for preliminary injunctions in the last suit brought in which the papers were never printed. Together they contain a complete list of the litigations.

Mr. Taggart: I will offer these papers in order that you may get the benefit of them. I will formally offer them. 223

The Court: You may offer them and they may be received, and later on you may agree upon some extracts or description of them.

Mr. Ketcham: Oh, yes.

Received and marked Exhibits 3, 3a and 3b, consisting of two books and a bundle of papers.

Those litigations began on the 25th day of June, 1900. That was the beginning, and the other litigations that are referred to, following that, after a time. The litigation against the Victor Talking Machine Company, began on the 22nd of December, or a few days later. 224

Mr. Ketcham: That is the Victor case?

The Witness: Yes. Those are the extreme dates. Mr. Seaman paid the expenses of all those litigations. No portion whatever of it was borne by the National Gramophone Corporation. I have covered by that statement the expenses of witnesses and all expenses; nothing whatever was paid by the corporation. I am to state certain items of these expenses. If I am allowed to refresh my recollection from my books and memoranda, what I paid out myself. From time to time, during the progress of the litigation and thereafter, Mr. Seaman has paid me upon this particular line of cases to which I have referred, \$6751.01 for disbursements and services. 225

Mr. Ketcham: I object. Only the amount of the expenditure is all we are concerned with.

Mr. Taggart: He has not paid it all.

Mr. Ketcham: I suppose the whole matter might be deferred on the theory that the defendants go hence without any liability, or else they are to account.

The Court: You do not propose to go into an accounting?

226

Mr. Taggart: No, only this, with the purpose to show that expenditures and liabilities were incurred and paid by Mr. Seaman, to an amount more than the total amount that was received by Mr. Seaman, and we have this as an answer for a claim to any accounting.

Mr. Ketcham: That is going into the accounting.

The Court: That would involve the accounting now.

Q. Do you know of any expenses beyond those, that Mr. Seaman paid out? A. I know of some other expenses.

Q. Substantial amounts? A. Oh, yes.

227

I do not know of any agreements respecting the institution of those suits between Seaman and the National Gramophone Corporation. I do not know of any agreement between him and the National Gramophone Corporation, save this which was put in evidence here.

No cross-examination.

FRANK SEAMAN, the defendant, called in his own behalf, being duly sworn, testified as follows:

Direct-examination by Mr. Taggart:

228

Q. I call your attention to that portion of the testimony of Mr. LaDow in which he spoke of having written to you a letter shortly after the 2nd of April, 1900, regarding the cancellation of the arrangement between you and the National Gramophone Corporation. You may state whether you received such a letter, signed by Mr. LaDow? A. I received a letter either in March or April, I believe, dated about that time. I remember the contents of those letters mentioned by Mr. LaDow in a general way. I have

I looked very thoroughly for both of those letters. I have not been able to find them. I received a letter from the National Gramophone Corporation in, I should say, February or March, 1900, calling my attention to the fact that I was not supplying them with goods and that unless I could fill their orders for goods, that they would be called upon to cancel their contract with me. About a month or six weeks after that, I received another letter from the National Gramophone Corporation, referring to the previous letter, stating that inasmuch as I had not supplied them with goods, that they cancelled that contract and would get their goods thereafter, elsewhere. Referring to my settlement with the parties named in the contract, in order to effect that settlement, I paid Mr. Horace T. Williams who negotiated it, \$10,000 in cash and \$10,000 of the stock of the Consolidated Talking Machine Company, the stock I received.

229

Aside from the agreements which have been offered in evidence here, I did not have any contract or arrangement with the National Gramophone Corporation.

230 ✓

By Mr. Taggart:

Q. I will ask you whether, aside from the contracts which have been offered here, did you have any arrangement in writing or agreement with the National Gramophone Corporation? A. I did not.

Q. Did you ever have any talk with them respecting any matters between you and them, outside of the subject-matter of these written contracts? A. I had a great many talks with them.

231

Q. But respecting any other business arrangement between you and them, of any kind? A. I did not.

By Mr. Ketcham:

Q. You have been asked upon your direct-examination, whether you had any agreement in writing, or arrangement between you and the company, outside

232 of the written papers. Do you mean to say that you have no other agreement, nor arrangement in writing, outside of the papers which have been put in evidence?
A. I do.

Defendant here rested and evidence closed.

By Mr. Taggart: I renew the motion to dismiss the complaint on the ground that they have not established a cause of action.

Decision reserved. Exception taken.

The foregoing contains all the evidence given upon the trial of this action.

233

Plaintiff's Exhibit A.

Order filed April 25, 1902, in the Westchester County Clerk's Office.

At a Special Term of the Supreme Court of the State of New York, in and for the County of Westchester, held at the County Court House, at White Plains, on the 5th day of April, 1902.

Present: Honorable Martin J. Keogh, Justice.

234

IN THE MATTER
of

The Application of the Directors of
the NATIONAL GRAMOPHONE
CORPORATION OF NEW YORK for
a voluntary dissolution.

The Petitioners herein having made a Motion that the Corporation, The National Gramophone Corpora-

tion of New York, be dissolved, and that a Permanent Receiver be appointed, with the usual powers and duties: 235

And upon reading and filing the Notice of Motion, and also the annexed affidavits of George Carlton Comstock and Eugene V. Daly;

And also upon reading the Report of Thomas F. Curran, Esq., the Referee appointed herein, heretofore, and on the 6th day of February, 1902, filed in the office of the Clerk of this Court:

And it appearing from the said affidavits and the said Report that an Order to Show Cause was heretofore, and on the 5th day of September, 1901, granted herein, why said Corporation should not be dissolved, and also that at the same time an order was entered herein, appointing Eugene V. Daly, Esq., Temporary Receiver of the assets of the said corporation, and that of these assets he has sold that portion which was salable, and collected the accounts so far as they have been collectible, except the patents and contracts, and certain property, the title to which is in dispute; and also that, having reduced the assets to cash, the said Temporary Receiver heretofore, and on the 26th day of March, 1902, filed his accounts with the Clerk of this County, said accounts being on file in said office. 236

And it further appearing, that upon the return of the said order to show cause, and on the 21st day of December, 1901, an order was entered herein, referring the matters stated in the said petition to Thomas F. Curran, Esq., as Referee, to take proof and report to this Court as to the same, and that the said Referee thereupon took testimony, and made his report to the Court, filed as aforesaid, recommending that the said corporation be dissolved. 237

And it also appearing further, from the said affidavits, that the question of any allowance for services and disbursements to the attorneys for the Petitioner herein, and to the said Eugene V. Daly, as Receiver, have not been passed upon:

238 Now, upon motion of Olney & Comstock, attorneys for the Petitioners herein, it is ordered

FIRST: That the aforesaid report of Thomas F. Curran, Esq., as Referee, be, and the same is hereby in all respects confirmed.

SECOND: That the National Gramophone Corporation of New York, the above named corporation, be, and the same is hereby dissolved.

239 THIRD: That Eugene V. Daly, Esq., is hereby appointed Permanent Receiver of the said Corporation, with the usual powers and duties; but that, before entering upon the duties of his trust, the said Permanent Receiver shall execute and file with the Clerk of this Court, in and for the County of Westchester, a bond with sufficient sureties to the People of the State of New York, in the sum of \$50,000, conditioned for the faithful discharge by him of the duties of his trust, which bond shall be approved as to form and sufficiency by a Justice of this Court.

240 And it is further ordered, that it be referred to T. F. Curran, Esq., as Referee, to take and state the accounts of the said Eugene V. Daly, Esq., as Temporary Receiver, and to take evidence as to the allowance to the attorneys for the petitioner herein of any sum or sums for their services and disbursements herein, and also as to the services and disbursements of the Temporary Receiver herein, and as to any allowance to be made to him for his commissions, disbursements and counsel fees, and also to take testimony and report as to any property in the possession of the said Temporary Receiver, the title to which is in dispute, and as to what property shall be delivered to the said Permanent Receiver: and thereupon to report to this Court, for its further action in the premises.

MARTIN J. KEOGH.

J. S. C.

Plaintiff's Exhibit B.

241

This is a Receiver's Bond with a penalty of \$50,000, pursuant to the order (Plaintiff's Exhibit A), made by Eugene V. Daly, of Flushing, as Principal, and the Fidelity and Deposit Company of Maryland as Surety, dated April 8, 1902, which recites as follows:

"WHEREAS, by an order made by the Hon. Martin J. Kough, one of the Justices of the above entitled Court, at a Special Term thereof; held at the County Court House at White Plains, New York, on the fifth day of April, 1902, the above named Eugene V. Daly was appointed permanent receiver of the said National Gramophone Corporation.

242

"NOW, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Eugene V. Daly, shall faithfully discharge the duties of his trust, and shall duly account for all moneys received by him, as such Receiver, then this obligation shall be void; otherwise to remain in full force and virtue:

The said Bond being duly signed, sealed, executed and acknowledged by the said Eugene V. Daly and The Fidelity and Deposit Company of Maryland.

Plaintiff's Exhibit C.

243

Petition and the schedules annexed to the same upon application for voluntary dissolution signed by the officers and a majority of the Directors of the National Gramophone Corporation which purport to set out all of the assets and liabilities of the corporation sought to be dissolved.

The said schedules do not set forth the claim asserted in this action against the defendant, or the contract Exhibit D, as assets of the corporation.

Exhibit B, with Answer.

TEN CENT
INT. REV. STAMP
CANCELLED.

We, the undersigned Frank J. Dunham, President, and Orville D. LaDow, secretary, respectively, of the National Gramophone Company, a stock corporation other than a moneyed or a railroad corporation, organized under the laws of the State of New York, do hereby, for the purpose of complying with the provisions of section 57 of the Stock Corporation Law, in relation to voluntary dissolution of corporations, make and attest this certificate, and attach the consent, verified statement and proofs required by said section, as follows to wit;

That the board of directors of such corporation, at a meeting called for that purpose, held at the office of the corporation, No. 874 Broadway, in the City of New York, on the thirty-first day of March, 1899, at eleven o'clock A. M. of which meeting at least three days notice was given to each, as appears by the affidavit of Orville D. LaDow, hereto annexed and forming part hereof, by a vote of a majority of the whole board adopted the following resolution.

"Resolved, That in the opinion of this board of directors, it is advisable to dissolve this corporation forthwith, pursuant to section 57 of the Stock Corporation Law, and that a meeting of the stockholders be called, to be held at the New York office of the corporation, at the office of the company, No. 874 Broadway, in the City of New York, on the nineteenth day of May 1899, at twelve o'clock noon, for the purpose of voting on a proposition that the corporation be dissolved;

"Resolved further, That the secretary cause a notice of such meeting to be both published and served, or mailed, according to law; that the secretary or treasurer, and the president or vice-president of the corporation, execute a certificate showing the adoption of this resolution, and setting forth the proceedings of the meeting to be held by

Agreement of Oct. 10, 1896.

THIS AGREEMENT, Made the Tenth day of October, A. D. one thousand eight hundred and ninety-six (1896), between the *Berliner Gramophone Company*, a corporation of the State of Virginia (hereinafter called "*Licensor*"), party of the first part, and *Frank Seaman*, of New York City (hereinafter called the "*Licensee*"), party of the second part, *Witnesseth That* :

WHEREAS, The Licensor exclusively controls, in the United States of America, the inventions of Emile Berliner, Esq., made and to be made, relating to the Gramophone and the Letters Patent of the United States issued and to be issued therefor (including the following patents, viz.: No. 372,786, dated 8 November, 1887, for a Gramophone; No. 382,790, dated 15 May, 1888, for a Process of Producing Records of Sound; No. 534,543, dated 19 February, 1895, for a Gramophone; and No. 548,623, dated 29 October, 1895, for an Improvement in Sound Records and Methods of Making Same); and the Licensee desires to buy, sell and deal in gramophones and gramophone goods (except recording apparatus) as hereinafter set forth ;

NOW, THEREFORE, IN CONSIDERATION as well of the sum of One Dollar paid by the Licensee to the Licensor, the receipt of which is hereby acknowledged, as of the sums of money hereafter to be paid as hereinafter described, and of the covenants on the part of the Licensee hereinafter contained, and subject to the terms of all the covenants hereinafter contained, the Licensor hereby grants to the Licensee the exclusive license to buy, sell and deal in, throughout the United States of America (except in the District of Columbia), gramophones and gramophone goods embodying the said inventions, and all improvements therein that may come into the Licensor's control (except recording apparatus), for a period of fifteen years from the date of this agreement;

AND, FOR THE CONSIDERATIONS AFORESAID, The Licensor covenants to and with the Licensee that:

1. As long as, during the period aforesaid, the Licensee punctually performs his covenants hereinafter contained, the Licensor shall sell exclusively to the Licensee the gramo-

phones and gramophone goods aforesaid, in the territory hereinbefore allotted to the Licensee, at the prices and on the terms hereinafter stated; and shall not sell or deliver any of the gramophones and gramophone goods aforesaid in the territory aforesaid to any other person or corporation, except to officers, directors and stockholders of the Licensor—and in that case only in reasonable quantities, for their own use and to be given away by them, but not to be sold for profit;

2. The gramophones and gramophone goods so to be sold by the Licensor to the Licensee shall conform to samples heretofore submitted by the Licensor and approved by the Licensee and such other samples as the Licensee may hereafter approve, or may himself make and give to the Licensor, with working drawings, patterns, cost-sheets and all other information, necessary for the manufacture of gramophones and gramophone goods, according to the said samples—*Provided*, That the Licensee shall make no sample discs or records;

3. As long as, during the period aforesaid, the Licensee punctually performs his covenants hereinafter contained, the Licensor shall fill, with reasonable promptness and despatch, all orders of the Licensee for gramophones and gramophone goods by delivering, f. o. b. cars or other means of transportation, designated by the Licensee, at the place of manufacture, gramophones and gramophone goods, as ordered, in good working and marketable condition according to samples—*Provided*, That the Licensor shall be allowed sufficient time to manufacture the said gramophones and gramophone goods, after the receipt of orders, and that, if, for any unavoidable cause, such as fire, flood, strikes of workmen, litigation or failure of facilities for transportation, delay occurs in filling the said orders, the delay shall not be deemed a breach of covenant, but the Licensee shall receive on the time limits of his minimum guaranty of purchases, as hereinafter set forth, an extension for a period equal to the period of the said delay—*And provided further* That, as long as, by reason of any litigation growing out of a contract heretofore made between the said Berliner Gramophone Company and Messrs. Tate and Jones, the Licensor is actually prevented from selling, to the Licensee and the Licensee is actually prevented from dealing in, gramophones and gramophone goods, within the New England States, there shall be a reduction of 12 per cent. in the Licensee's minimum guaranty of advertising, and in the Licensee's minimum guaranty of purchases, as hereinafter set

forth; and the Licensor shall be permitted to sell under the contract with Tate and Jones.—*And provided further* That the Licensor shall be permitted to sell gramophones and gramophone goods, under a contract heretofore made between the said Berliner Gramophone Company and Edward J. Nellis, as long as the said contract shall be in force, but the said Licensee shall cause the said contract to be cancelled without unnecessary delay;

4. If the Licensor makes default and fails to fill, with reasonable promptness and despatch, as hereinbefore covenanted, any of the orders of the Licensee, the Licensee may, after notification in writing of his intention to the Licensor, supply, in the manner and on the terms hereinafter stated in Section 8 of this agreement, the gramophones, gramophone goods and parts for the repair thereof, necessary to fill the orders so defaulted by the Licensor;

5. The Licensor shall, for the prices and on the terms hereinafter stated, furnish to the Licensee parts for the repair of gramophones and gramophone goods, in so far as the Licensor can furnish the said parts without interfering with its filling the regular orders of the Licensee for gramophones and gramophone goods—*Provided*, That, if required by the Licensor, the parts to be replaced by the parts thus furnished, shall be surrendered to the Licensor, or their loss shall be satisfactorily accounted for;

6. The Licensor shall defend at its own cost and expense, whenever requested by the Licensee, all actions and suits involving the validity of any of the patents hereinbefore mentioned, or of any other patents which may be issued for improvements in the said inventions, and may become subject to this agreement;

7. The Licensor shall forward immediately to the Licensee all mail of whatever kind or nature which has to do with the selling of goods, within the territory aforesaid during the life of this agreement—except in so far as the said mail should, under contracts with the United States Gramophone Company, be forwarded to that Company;

8. The Licensee shall have the privilege of supplying by contract to the Licensor gramophones and gramophone goods and parts for the repair thereof to fill the orders of the Licensee—*Provided* That the said gramophones, gramophone

goods and parts for the repair thereof shall be equal in quality to those supplied by the Licensor—*And provided also* That the Licensee shall furnish the said gramophones, gramophone goods and parts for the repair thereof, at, at least, 5 per cent. less than the cost at which the Licensor can manufacture them or procure them elsewhere, and that any loss or delay resulting from their not proving satisfactory or not being delivered on time, shall be deemed to be the fault of the Licensee. But the manufacture of gramophones, gramophone goods and parts for the repair thereof, if undertaken by the Licensee,

*13

shall be subject to the restrictions of all contracts with the United States Gramophone Company and Emile Berliner, and under no circumstances shall the Licensee manufacture discs or records;

9. The Licensee may cause to be incorporated and organized, under the laws of the State of New York or of any other State, a corporation or corporations with such powers and capital as the Licensor may in writing approve, and after such approval the Licensee may assign to the said corporation or corporations all the rights hereby granted by the Licensor, *Provided* That the said corporation or corporations shall assume and undertake the performance of the covenants to be performed by the Licensee hereunder—whereupon all liability on the part of the Licensee for the future performance of the said covenants shall cease, but the Licensee shall not be relieved from his liability for previous breaches of the said covenants;

AND, IN CONSIDERATION of the license and covenants by the Licensor hereinbefore contained, the Licensee does hereby covenant to and with the Licensor as follows, viz.:

10. For all gramophones, gramophone goods and parts for the repair thereof ordered by the Licensee, the Licensee shall, within ten days after their delivery, f. o. b. cars or other means of transportation, designated by the Licensee, at the place of their manufacture, pay in full without discount, and shall in any event take and pay for all goods ordered; and if at any time, or from time to time, the Licensor shall in writing request payment on delivery, the Licensee shall pay the Licensor according to the Licensor's request;

11. As a minimum guarantee of purchases, the Licensee shall order and purchase from the Licensor, according to

samples already approved by the Licensee and such as may hereafter be established as hereinbefore covenanted, and at prices to be fixed as hereinafter mutually covenanted, gramophones and gramophone goods amounting at manufacturing cost to the aggregate amounts following (which amounts in every instance are understood to mean not the prices but merely the manufacturing cost of the said gramophones and gramophone goods, exclusive of the 40 per cent. margin hereinafter mentioned and all royalty), viz.: during the month of September, 1896, \$1,333.34; during the month of October, 1896, \$2,666.67; during the month of November, 1896, \$5,333.34; during the month of December, 1896, \$8,000; during the month of January, 1897, \$2,766.67; during each and every calendar month in the year 1897 after the month of January, \$6,666.67; during the month of January, 1898, \$6,666.67, and thereafter, until the expiration of the period of fifteen years first hereinbefore mentioned, during each and every calendar month, \$10,000—*Provided* That any excess of purchases in any one month over and above the minimum guaranty fixed in this section for that month shall be applied thereafter, at the option of the Licensee, toward the fulfillment of the minimum guaranty for any subsequent month during the year then current, dating the year from the first day of February last precedent—*And provided further* That parts ordered by the Licensee for the repair of gramophones and gramophone goods and on which the Licensor is not required to pay royalty shall not be counted toward the fulfillment of the Licensee's minimum guaranty;

12. The Licensee shall use his best efforts to promote the gramophone business in the United States and shall advertise gramophones and gramophone goods prominently and freely as "Berliner" gramophones and "Berliner" gramophone goods; and shall expend immediately, and, in any event, not later than 15th March, 1897, for that purpose, the sum of at least \$10,000 at lowest current publishers' prices to advertisers.

13. The Licensee shall not manufacture, buy, sell or use gramophones or gramophone goods, or any parts thereof, or other talking machine or parts thereof except such as he buys from the Licensor;

14. The Licensee shall see that all gramophones and gramophone goods sold by him bear serial numbers, when the Licensor affixes serial numbers; and shall keep a record of all

17. The price which the Licensor shall receive from the Licensee for gramophones and gramophone goods shall be the sum of the following three items, viz.: first, the actual manufacturing cost; second, a margin of 40 per cent. of the said manufacturing cost; and third, the royalty which the Licensor is required to pay to the United States Gramophone Company to the amount of 10 per cent. of the retail price of the said gramophones and gramophone goods;

18. The term "manufacturing cost" as used in this agreement shall be held to include the cost of labor, materials and supplies consumed in making the said gramophones, and gramophone goods, and parts for the repair thereof, and in their packing ready for shipment, and in their delivery f. o. b. cars or other means of transportation, designated by the Licensee at the place of their manufacture, the rents of manufacturing plants leased, and 6 per cent. interest on the cost of manufacturing plants owned, (provided such plants leased and owned shall not exceed the reasonable facilities for filling the Licensee's orders), insurance and taxes on such plants, and on materials and supplies used in connection therewith, and on

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goods in course of manufacture or completed, and all other items which relate exclusively to the process of manufacturing or are usually or properly charged to manufacturing account; but shall not include the salaries of officers nor the expense of maintaining the organization of the Licensor, or its office, or its correspondence, or of keeping its accounts, or of conducting its litigation, nor any damages for personal injuries to employes, nor any charges which are usually or properly classified in office account, or selling account—*Provided* That the laboratory expenses shall not be charged in the manufacturing cost of records, although the cost of the matrix, and the cost of talent, shall be included in the manufacturing cost of records, whether the records prove satisfactory to the Licensee or not;

19. If any arrangements are made between the United States Gramophone Company and the Licensor whereby the 10 per cent. royalty hereinbefore mentioned, is in any way decreased, the Licensor shall give the full benefit of this decrease in royalty to the Licensee;

20. Quarterly (on or about 1 January, 1 April, 1 July and 1 October in each year), the Licensor and Licensee shall

gramophones and gramophone goods sold by him, showing distinctly such serial number and the purchaser of every article sold; and shall at all times exhibit the said record to the Licensor when requested;

15. The Licensee, hereby admitting and conceding the validity of the Letters Patent hereinbefore mentioned, shall not dispute or contest them, and shall not make use of any other name than that of Emile Berliner, in connection with gramophones and gramophone goods; and shall not detach or deface any patent marks or other marks or labels placed by the Licensor upon its gramophones, gramophone goods and publications, and shall not add to them, other marks or labels, without the consent in writing of the Licensor;

16. For the breach of any covenant, herein contained, on the part of the Licensee, the Licensor may, at its option, give notice in writing to the Licensee, pointing out the cause of complaint; and if, within thirty days after the delivery of the said notice to the Licensee, the Licensee shall not remove the cause of complaint, and fully perform the covenant so broken, then the Licensor may, by second notice in writing to the Licensee, revoke the license hereby given, withdraw from all its covenants, and annul all the Licensee's rights hereunder; and in that case all liability of the Licensee, on his covenants in this agreement shall cease, except that he shall remain bound to take and pay for, in accordance with the terms hereof, all gramophones, gramophone goods and parts for the repair of gramophones for which he has at the time actually given orders. If the breach of covenant consists in the failure to pay money, the first notice may, after ten days have expired, at the option of the Licensor, work the revocation, withdrawal and annulment hereinbefore described, without any further days of grace or second notice. The remedy given in this section is exclusive so far as the obligation of the Licensee, to purchase goods to any particular amount is concerned, and the agreement to make such purchases shall be enforced only in accordance therewith and not by any other remedy, legal or equitable; as to all other obligations of the Licensee the remedy given in this Section is merely cumulative, and shall not deprive the Licensor of any of its other legal or equitable remedies;

AND IT IS HEREBY MUTUALLY COVENANTED AND AGREED
By and between the parties hereto that:

meet to estimate as nearly as possible the manufacturing cost of all styles of gramophones and gramophone goods, which the Licensor may be supplying, to the Licensee at that time, or the Licensor or the Licensee may desire to place upon the market. The cost, so estimated, shall be the basis for billing goods during the ensuing quarter, and at the end of the quarter, the Licensor shall correct the estimate according to actual experience, and any difference between the estimated cost shall be adjusted between the Licensor and the Licensee by the payment of the difference in cash;

21. At these quarterly meetings, the retail prices for the ensuing quarter shall be fixed and remain fixed until changed at a subsequent quarterly meeting, and shall form the basis for estimating the royalty hereinbefore mentioned. At these quarterly meetings the Licensee shall propose the retail prices to be fixed by the meetings, and the prices proposed by them shall be adopted and fixed—*Provided* That they shall not be less than the prices which the Licensee pays the Licensor, nor less than the wholesale or jobbers' prices which the Licensee receives—*And provided further* That, in no event, shall the royalty hereinbefore mentioned be less than fifty cents on any one gramophone—*And provided finally* That the retail prices so to be fixed shall be the prices at which the Licensee shall, in good faith and at all times, while the said retail prices are in force, sell gramophones and gramophone goods to purchasers at retail, and if the Licensee shall refuse to fix a retail price at the time of his order, then the retail price on the basis of which royalty is to be computed as hereinbefore covenanted shall be $2\frac{1}{2}$ times the price which the Licensor receives from the Licensee, for the said gramophones and gramophone goods—this royalty shall be subject to correction, should the Licensee at any time fix a higher price for the said gramophones and gramophone goods. Should the Licensee decide at any time to merely rent or lease any of the gramophones or gramophone goods, a special arrangement as to royalty shall be made with the Licensor.

22. The Licensor and the Licensee shall at all times exhibit their books of account to each other, when requested, in order to determine any questions in dispute under this agreement;

23. This agreement shall remain in full force and effect for a period of fifteen years from its date; and if, at the expiration

of that period, the Licensee desires a renewal hereof under any patents then existing and subject hereto, the Licensor shall grant such renewal to the Licensee, upon as favorable terms as it shall be willing to accord to any other individual or corporation ;

24. All the agreements now existing between the Licensor and the Licensee are, by the execution of this agreement, made null and void, and all liability thereunder is hereby waived, except that any credit for money paid, which is now standing as due to the Licensee, may be hereafter applied in payment for gramophones and gramophone goods under this contract ;

25. No alteration in, or waiver of the terms of this agreement, shall be valid unless reduced to writing, and signed and sealed by the Licensor and the Licensee ;

26. This agreement shall be so construed, as not to require the Licensor or the Licensee, to violate any contracts with the United States Gramophone Company, or Emile Berliner, to which the patents hereinbefore mentioned, or the Licensor may be subject—especially the agreements between the United States Gramophone Company and W. C. Jones, dated 2 September, 1895, and 4 October, 1895, and the agreement between Emile Berliner and W. C. Jones, dated 2 September, 1895, copies of which are hereto attached ;

27. If any dispute shall arise, between the Licensor and the Licensee, regarding the interpretation of this agreement, each party shall appoint a disinterested arbitrator, and in writing notify the other of the appointment, and the two arbitrators thus appointed shall choose a third, and the three so appointed and chosen, shall decide the dispute ; and an award signed by any two of the said three arbitrators shall be final, conclusive and binding upon both parties. And if either party, upon receiving from the other written notice to appoint an arbitrator as here aforesaid, shall neglect for a period of sixty days to make such an appointment, and to notify the other party as aforesaid, the other party, after appointing his own arbitrator, may appoint another disinterested person as arbitrator for the party so neglecting to make an appointment, and thereafter the arbitration shall proceed in the same manner, and with the same effect as if each party had appointed his own arbitrator. And, if two arbitrators when appointed cannot agree upon a third, or if, after three arbitrators have been appointed and

chosen, at least two of them have not agreed upon a decision, and signed an award within thirty days after notice in writing by either party to make an award, then the party giving such notice may determine the arbitration; and resort may be had to legal proceedings;

28. The term "Licensor" as used in this agreement shall be held to mean *the said* "Licensor," its successors and assigns; and the term "Licensee" as used in this agreement shall be held to mean *the said* "Licensee," his executors and administrators and the corporation to which, with the approval of the Licensor, as hereinbefore covenanted, the said Frank Seaman may assign the rights hereby granted to the Licensee;

29. The phrase "gramophones and gramophone goods" as used in this agreement shall be held to include, not only the machines and mechanical devices constituting the inventions hereinbefore mentioned and all the improvements in the said inventions that may come into the Licensor's control (except recording apparatus), but also all motors (except electric batteries) that may be adopted for driving the said machines and mechanical devices, as well as all other mechanism, appliances and accessories, that may be adopted as necessary or useful in handling, operating or using the machines or mechanical devices, which constitute the said inventions or improvements—for it is the intention hereof to refer by the phrase aforesaid, to the complete sound-reproducing machine, which may embody the said inventions and improvements, and all parts of the said machine, notwithstanding the fact that other inventions may also be embodied therewith in the said machine.

In Witness Whereof, The Licensor has caused this agreement to be signed in its name by the President and sealed with

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its corporate seal attested by its Secretary, and the Licensee has hereunto set his hand and seal, the day and year first above written.

BERLINER GRAMOPHONE COMPANY,

By

THOS. S. PARVIN,

President.

[Corporate
Seal,]

Attest:

MAX H. BIERNBAUM,
Secretary.

FRANK SEAMAN. [SEAL]

COMMONWEALTH OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA, } ss.

BE IT REMEMBERED, That on this Tenth day of October A. D. 1896, personally came before me, the undersigned, Notary Public within and for the City and County aforesaid, Thomas S. Parvin, who, being by me duly sworn, did depose and say that he is the President of the Berliner Gramophone Company, the Licensor in the foregoing instrument; that the name of said Company is signed to said instrument by him as President of said Company by virtue of the order of the Board of Directors; that the seal of the Company attached thereto is the proper and genuine seal of said Company, and is affixed thereto by order of said Board of Directors; and the said Thomas S. Parvin, as President, acknowledged the foregoing instrument to be the act and deed of the Berliner Gramophone Company for the uses and purposes therein expressed.

THOS. S. PARVIN.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal of office, this Tenth day of October, A. D. 1896.

CHAS. H. BANNARD,
Notary Public.

[Notarial
Seal.]

COMMONWEALTH OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA, } ss.

BE IT REMEMBERED, That on this Tenth day of October, A. D. 1896, personally came before me, the undersigned, a Notary Public in and for the City and County aforesaid, M. H. Biernbaum, who, being by me duly sworn, did depose and say that he is the Secretary of the Berliner Gramophone Company, Licensor in the foregoing instrument, that he affixed the seal of said Company thereto, and duly attested the same, by order of the Board of Directors thereof.

MAX H. BIERNBAUM.

In Witness Whereof, I have set my hand and affixed my notarial seal, this Tenth day of October, 1896.

CHAS. H. BANNARD,
Notary Public.

[Notarial
Seal.]

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STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss.

Before me, the undersigned, a Notary Public in and for the City and County aforesaid, personally came the above named Frank Scaman, who in due form of law acknowledged the foregoing instrument to be his act and deed for the purposes therein specified.

Witness my hand and notarial seal, this 12th day of October A. D. 1896.

[Notarial
Seal.]

W. M. ANDRUS,
Notary Public.
N. Y. Co. 24.

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Witness my hand and notarial seal, this 12th day of
October A. D. 1896.

W. M. ANDRUS

Notary Public.

N. Y. Co. 24

(Notarial Seal.)

~~Exhibit A annexed to the foregoing complaint is
composed of a number of agreements, of which Ex-
hibit D in this action is one.~~

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Plaintiff's Exhibit E.

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KNOW ALL MEN BY THESE PRESENTS, that I, FRANK SEAMAN, residing in Yonkers, County of Westchester, State of New York, party of the first part, for and in consideration of the sum of forty-nine thousand eight hundred dollars (\$49,800) in stock of The National Gramophone Company to me in hand paid at the en- sealing and delivery of these presents, by the National Gramophone Company, a corporation duly organized and doing business under and by virtue of the laws of the State of New York, party of the second part, re- ceipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, its successors and assigns, all my right, title and interest and property in, to, and under, a certain contract or agreement, dated the tenth day of October, 1896, executed by and between the Berliner Gramophone Company, of Vir- ginia, and myself, said party of the first part, and all rights and privileges secured thereby; and agree that I will use my best endeavors to secure the recognition by the said Berliner Gramophone Company of said transfer, and that in case such recognition cannot be

the said party of the first part will act with the party of the second part and place in its charge all business to be carried out by me under said contract and turn over to said party of the second part all goods thereunder which may be advantageously sold by said company, and turn over and deliver to it all profits and advantages whatever which may be derived from said contract with the Berliner Gramophone company.

TO HAVE AND TO HOLD the said contract and rights transferred unto the said party of the second part, its successors and assigns, forever.

In Witness Whereof I have hereunto set my hand and seal this fourth day of November, one thousand eight hundred and ninety-six.

FRANK SEAMAN, L. S.

State of New York,
City and County of New York. } ss.:

On the fourth day of November, in the year one thousand eight hundred and ninety-six, before me personally came Frank Seaman, to me known, and known to me to be the same person described in, and who executed the within bill of sale, and acknowledged to me that he executed the same.

F. C. HARDY,
Notary Public,
Kings Co.,
Certificate filed in N. Y. Co.

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Plaintiff's Exhibit F.**NATIONAL GRAMOPHONE COMPANY.****RECORDS.**

Minutes of meeting of incorporators and stockholders of the National Gramophone Company held at No. 874 Broadway, on the 4th day of November, 1896, pursuant to the following call for meeting:

New York, November 4th, 1896.

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We, Frank Seaman, Harry Bentz and William B. Owen subscribers to the certificate of incorporation of the National Gramophone Company and stockholders in said corporation and being all of said subscribers and stockholders do hereby call a meeting of stockholders to be held at No. 874 Broadway, on the 4th day of November, 1896, at 4 o'clock P. M., for the purpose of adopting by-laws and transacting such other business as may be brought before the meeting, and we do hereby severally waive notice and publication of notice of the time, place and purpose of such meeting.

FRANK SEAMAN,
HARRY BENTZ,
WILLIAM B. OWEN.

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There were present at the meeting Frank Seaman, Harry Bentz and W. B. Owen.

The call for meeting signed by all of the stockholders was read and ordered filed and spread upon the minutes.

The meeting was called to order by Mr. Owen, and thereupon Mr. Bentz was elected chairman of the meeting.

It was unanimously Resolved that the following by-laws should be adopted.

(BY-LAWS)

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Thereupon it was resolved, Mr. Seaman not voting, that a certain contract dated October 10, 1896, with the Berliner Gramophone Company be purchased from Mr. Seaman by transfer in such form as the Directors may approve, and that in consideration thereof 498 shares of the capital stock of this company be issued to said Frank Seaman, and that any action which the Directors of the Company may take with reference thereto, be and the same hereby is ratified and approved.

There being no further business the meeting adjourned.

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Plaintiff's Exhibit G.

Minutes of first meeting of the Directors of the National Gramophone Co., held at No. 874 Broadway, New York, on the 4th day of November, 1896, pursuant to the following call for meeting:—

"New York, November 4, 1896. The first meeting of the Directors of the National Gramophone Co., is hereby called to be held at the office of Mr. Frank Seaman, 874 Broadway, in the City of New York, on the 4th day of November, 1896, at four o'clock P. M., and notice of the time, place and purpose of such meeting is hereby waived by each of us.

FRANK SEAMAN,
HARRY BENTZ,
WILLIAM B. OWEN."

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There were present at the meeting Frank Seaman, Harry Bentz and William B. Owen.

The meeting was called to order by Mr. Bentz.

Upon motion of Mr. Bentz, seconded by Mr. Seaman, Mr. Owen was elected chairman of the meeting, and took the chair.

298 Upon motion of Mr. Seaman, seconded by Mr. Bentz, it was unanimously Resolved, that a meeting of the stockholders of the corporation be called to convene immediately, and that pending the meeting of the stockholders the directors take a recess.

The stockholders' meeting having duly been held, upon its adjournment the directors re-convened, all being present.

The chairman reported that the stockholders of the corporation had adopted by-laws providing for the election of a President, Vice-President, Treasurer and Secretary. The by-laws were read, accepted and ordered filed and spread upon the minutes.

299 Upon motion of Mr. Bentz, seconded by Mr. Seaman, the Directors then proceeded to the election of officers.

The Chairman having requested that nominations be made for President Mr. Bentz nominated Mr. Frank Seaman for President. There being no further nominations the directors proceeded to the election of President by ballot. There being three ballots cast it was found that Mr. Seaman had received all of them, and he was thereupon duly declared elected, as President, and took the chair.

The directors then proceeded to the election of Vice-president and a ballot being cast it was found that Mr. Owen had been unanimously elected, having received three votes.

300 The directors then proceeded to the election of treasurer. Mr. Harry Bentz was nominated, and upon a ballot being taken was elected treasurer, three ballots being cast, all in his favor. Whereupon Mr. Bentz was duly declared elected treasurer of the corporation.

The directors then proceeded to the election of secretary. Mr. Owen having been nominated a ballot was taken, three ballots being cast. All being in his favor Mr. Owen was declared duly elected secretary.

It was unanimously Resolved, that the subscribers to the certificate of incorporation of the company be

and agreed to pay for stock subscribed by them. 301
 Thereupon the treasurer announced that Mr. Bentz
 and Mr. Owen had each paid to him the sum of \$100
 being the amount of par value of one share, and that
 the sum of \$200 so paid in.

It was unanimously Resolved, that the sum of \$200
 be paid Messrs. Morse & Acker upon account of ex-
 penses incurred in the incorporation of the company
 and the service rendered in its organization. The
 treasurer reported that he had paid such sum, and he
 left the receipt of Morse & Acker therefor.

The president thereupon read the resolutions from
 the minutes of the stockholders' meeting requesting the
 acquisition of property by the company and the issuing
 of stock therefor, and having called the vice-president
 to the Chair retired from the meeting. 302

Whereupon the vice-president inquired the further
 pleasure of the meeting; and it was unanimously Re-
 solved, That a certain contract or agreement dated the
 10th day of October, 1896, executed by and between
 the Berliner Gramophone Co., of Virginia and Frank
 Seaman of New York, and all rights and privileges se-
 cured thereby be acquired by the company for its use,
 and that the rights and privileges of said Frank Sea-
 man thereunder be transferred to this company as fully
 as he is able to transfer the same, and that this com-
 pany ask the agreement of said Frank Seaman to use
 his best endeavors to secure the recognition by the
 said Berliner Gramophone Co., of such transfer, and
 that he agree in case such recognition cannot be secured 303
 to act with this company and place in its charge all
 the business to be carried out by him under such con-
 tract obtained, and turn over to this company all goods
 thereunder which may be advantageously used by this
 company, and turn over and deliver to this company
 all profits and advantages whatever which he may de-
 rive from the said contract with the Berliner Gramo-
 phone Co., and that such contract be accepted as full
 payment by Frank Seaman to the capital stock of the
 company made in its certificate of incorporation

304 amounting to 498 shares of the value of \$49,800 and that stock of this company be issued, full-paid and non-assessable in payment for such contract: that the officers of the company be authorized and directed to receive a transfer of such contract accordingly and issue such stock pursuant to this resolution.

Whereupon Mr. Seaman was recalled and informed of the action of the directors. Thereupon Mr. Seaman took the chair, and it was unanimously Resolved, That all of the stock of the company as subscribed in its certificate of incorporation and paid for in money and property be issued, full-paid and non-assessable to the persons entitled thereto.

305 Whereupon the officers of the company proceeded to take a transfer of the property, as above specified and issue the stock according to such resolution.

It was unanimously Resolved, That the principal office or place for transacting the business and financial concerns of the company shall be in the City of Yonkers, County of Westchester, State of New York, which is the residence of Mr. Frank Seaman, and the principal offices of the corporation in the City of New York where its books of account shall be kept and its legal business transacted shall be located at 874 Broadway.

306 It was unanimously Resolved, That the executive committee procure the seal of the company, suitable books, office, office furniture and appliances for the corporation and in general proceed to organize and systematize the business as necessary, and they shall be from time to time instructed by the board of directors and that in the absence of specific instructions by the board they carry on the business in general upon the lines heretofore laid down while conducted by Mr. Seaman.

The meeting was then adjourned.

WILLIAM BARRY OWEN,

Secretary.

Plaintiff's Exhibit H.

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Meeting of the directors of the National Gramophone Co., called at 5 o'clock, P. M., Dec. 11, 1896. There were present Messrs. Seaman, Owen and Bentz, the president in the chair. Mr. Owen made a motion, which was seconded by Mr. Bentz, that the directors ratify the payments made the Berliner Gramophone Co., of three checks of \$2,000 each of following dates: Dec. 7, 11 and 18, paid on account of goods received under the National contract.

The motion was carried unanimously.

Mr. Owen then made a motion that an order be placed with the Berliner Gramophone Co., for 600 machines, style 25, price not to exceed \$4 each for Johnson's part. The motion was seconded by Mr. Bentz and carried by a unanimous vote of the directors.

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Mr. Owen moved that the National Gramophone Co. pay Mr. Seaman \$15,000 for all the assets of the National Gramophone Co., as owned by him as an individual, book accounts, bank accounts, stock fixtures, also book accounts due him by the Berliner Gramophone amounting to about \$3,500, also credits of \$1,000 due on Nellis contract, and that the president and treasurer be authorized to give notes for said amount. Seconded by Mr. Bentz and carried.

WILLIAM BARRY OWEN,

Secy.

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Plaintiff's Exhibit I.

MEMORANDA OF AGREEMENT made and entered into this 1st day of October, 1897, by and between the National Gramophone Company, a corporation duly organized under the laws of the State of New York, party of the first part, and Frank Seaman, party of the second part, WITNESSETH:

310 WHEREAS by an agreement dated the 4th day of November, 1896, the party of the second part transferred unto party of the first part certain rights, grants and privileges from the Berliner Gramophone Company, under and by virtue of an agreement executed by and between said Company and the party of the second part, dated the 10th day of October, 1896, which transfer it was intended and desired by the parties hereto, should be recognized by said Berliner Gramophone Company, and

WHEREAS said Berliner Gramophone Company has declined to recognize the party of the first part under said contract, but has continued to bill all goods to the party of the second part, and it being deemed advisable by the parties hereto that such assignment and transfer be modified as herein provided;

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Now this agreement witnesseth, that for and in consideration of the sum of one dollar to each in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, the parties hereto have agreed as follows:

The party of the first part shall and hereby does surrender and re-transfer to the party of the second part the aforesaid contract and agreement, and all rights and privileges thereunder.

And the party of the second part does hereby covenant and agree to and with the party of the first part, to sell and deliver to it, any and all Gramophones and Gramophone goods which it may require in its business, so far and as rapidly, and in such quantities as it shall be possible for him to obtain the same under and by virtue of his said contract, and as shall be required by the parties of the first part, and that such goods be so sold and delivered at the price at which the same shall be received by him, with the addition thereto of one per centum (1%) to such price to cover any expenses of advertising which he may incur, and to compensate him for his risk and attention in carrying on such business under said contract.

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And it is further mutually covenanted and agreed 313
that while the party of the first part shall purchase
from the party of the second part such goods in suffi-
cient quantities to satisfy the terms of his said con-
tract, that he shall sell to no other person any of such
goods, and shall use his best endeavors, so far as his
other appointments may permit, to advance the inter-
ests of the party of the first part in selling such goods,
and that the party of the first part shall use its best en-
deavors to introduce such goods more generally and
extend the sales of same.

In testimony whereof, the party of the first part has
caused its corporate seal to be affixed hereto, and the e
presents to be signed by its President, and the party
of the second part has hereunto set his hand and seal 314
the day and year first above written.

THE NATIONAL GRAMOPHONE CO.,
by O. D. La Dow,
President.

FRANK SEAMAN.
(Corporate Seal.)

Plaintiff's Exhibit J.

Minutes of a Special Meeting of the directors of
the National Gramophone Co. duly held at the office
of the company, in the City of New York on the first
day of October, ~~1905~~, pursuant to a call of the presi- 315
dent. 1897

Present at the meeting: Messrs. Seaman and La
Dow.

The president reported that the business of the com-
pany had been profitable and that a dividend of two
per cent could be declared out of the profits realized
up to the present time after deducting all losses.

Thereupon it was unanimously Resolved, that a divi-
dent of two per cent upon the stock of the company be

316 declared, payable to stockholders of record on the 15th day of October, 1897, and that a check for the same be mailed accordingly.

The president then reported that the assignment of the contract between himself and the Berliner Gramophone Co., dated the 10th day of October, 1896, which document was made to this company on the 4th day of Nov., 1896, had never been recognized by the Berliner Co. in selling and billing their goods but that all dealings had been carried on by the Berliner Company with and goods charged to him personally. The president thinking the situation undesirable owing to these facts tendered his resignation to take effect when his successor should be elected.

317 Thereupon it was unanimously Resolved that O. D. La Dow be elected president of the company to fill the place so made vacant.

Mr. La Dow accepted such election and took the chair. Mr. Seaman thereupon tendered his resignation as director of the company to take effect when his successor should be chosen.

Mr. W. F. Hubbard was unanimously elected to fill the place so made vacant.

318 It was thereupon unanimously Resolved, That the contract between the Berliner Gramophone Co. and Frank Seaman, dated Oct. 10, 1896, and assigned by said Seaman to this company upon the 4th day of Nov., 1896, be and the same is hereby surrendered and re-transferred to him upon his contract and agreement to sell and deliver to this company any and all gramophones and gramophone goods which it may require, so far as it shall be possible for him to obtain same under and by virtue of his said contract, and that such goods to be so delivered and sold at the price at which the same shall be received by him with the addition of one per centum to such price to cover any expenses of advertising, which he may incur and to compensate him for his risk and attention in carrying on such business under said contract. Such contract

shall provide that while this company shall purchase 319
from said Seaman such goods in sufficient quantity to
satisfy the terms of his said contract, that he shall sell
to no other person and shall use his best endeavors
so far as his other appointments may permit to ad-
vance the interests of the company in selling such
goods, and that this company shall use its best en-
deavors to introduce such goods more generally and
extend the sales of the same.

And it was further Resolved, That the president be
authorized to execute the necessary agreements to
carry into effect this resolution.

The meeting then adjourned.

O. D. LA DOW,
Secretary. 320

Plaintiff's Exhibit K.

Minutes of a meeting of the directors of the Na-
tional Gramophone Co., held at the offices of the com-
pany 874 Broadway, New York, immediately after
the election of directors pursuant to the by-laws.

There were present at the meeting, Messrs. Hub-
bard and La Dow, being a quorum.

It was unanimously Resolved, That Mr. La Dow
be elected president and secretary of the company, and
that Mr. Frank Seaman be elected treasurer and that
Mr. W. F. Hubbard be elected vice-president 321

The minutes of all the previous meetings of the
directors and stockholders of the company were read
and approved, save that the minutes of the meeting of
June 5th were ordered corrected by the insertion of
the words "Director and" before the word "secretary,"
relating to the resignation of Mr. Owen and the elec-
tion of Mr. La Dow, so that the said minutes shall
read as follows:

Unclassified
Oct 1, 1897

322 "Upon motion of Mr. Seaman the resignation of Mr. Owen as director and secretary of the National Graphophone Co. was accepted, and upon motion of Mr. Owen Mr. La Dow was duly elected director and secretary." etc.

The ~~minutes~~ as amended were then approved as a whole.

It was ~~unanimously~~ resolved That whereas subsequent to the organization of the company, Mr. Frank Seaman advanced and paid out for the subsequent use of the company, various sums of money, amounting in the aggregate to \$15,000, which sum is still due to said Seaman that this company authorize its president to execute or obtain promissory notes in such amount payable as may be mutually agreed upon and deliver the same to Mr. Seaman and that such notes bear interest from date.

323

It was ~~unanimously~~ Resolved, That the conduct of the business by the officers of the corporation and the actions of the directors and committees be and the same are hereby ratified and approved.

It was ~~unanimously~~ Resolved, That the capital stock of this company be increased from \$50,000 to \$200,000 and that a special meeting of the stockholders for the purpose of voting upon a proposition so to increase the capital stock be called to be held Feb. 3, 1908, at 12 o'clock noon and notice of such meeting be duly published and made according to the statute and by-laws.

324 The meeting then adjourned.

Plaintiff's Exhibit L.

325

Minutes of an annual meeting of the National Gramophone Co. held at its offices No. 874 Broadway, New York, on the 18th day of January, 1898, pursuant to the by-laws and a notice of the same duly given to each of the stockholders of the company and publication of notice having been waived by each of said stockholders.

There were present at the meeting Messrs. Frank Seaman, O. D. La Dow and Wm. F. Hubbard, owners of a majority of the stock of the company.

Mr. La Dow took the chair and called the meeting to order.

Upon calling the roll the said stockholders were found to be present as follows: Mr. Frank Seaman, 326
owning 406 shares, Mr. Wm. Hubbard, owning two shares, Mr. O. D. La Dow, owning 10 shares.

Notice and waiver of notice of meeting by all of the stockholders of record was filed, being proof of proper notice of meeting.

Reports of officers were then taken up.

The president reported upon the general business of the company, and the treasurer made a report.

There were no reports of committees.

The election of directors was then taken up.

No inspectors of election having been chosen or being in attendance the stockholders unanimously elected the following inspectors of election, who being duly sworn, proceeded to take the ballot of the meeting: Catherine Hubbard and Frances Crouch. 327

Thereupon the inspector opened the polls and the stockholders proceeded to vote for directors, with the following result.

O. D. LaDow, 418 ballots.

L. H. Seaman 418 ballots

W. F. Hubbard 418 ballots

The president thereupon declared the election of the foregoing directors, the same being unanimous.

The meeting was then voted and declared adjourned.

327

Plaintiff's Exhibit M.

Minutes of the annual meeting of the National Gramophone Co. held at its offices 874 Broadway in the city of New York on the 17th day of January, 1899, pursuant to the stockholders of the by-laws and the notice of the same duly given to each of the stockholders of the company, individually and through publication of notice of meeting and as required by said by-laws.

There were present at said meeting owners of a majority of the stock of the company as shown upon the roll call as hereinafter follows.

329 Mr. LaDow took the chair and called the meeting to order.

Mr. Wiggin, the auditor of the company was present and by unanimous consent read a report showing the business of the company during 1898, which was to be accepted as the president's report.

Upon motion of Mr. McAdoo it was unanimously Resolved, That Mr. Frank Seaman be made chairman of the meeting and that Mr. LaDow be made secretary of the meeting.

330 Upon calling the roll the following stockholders were found to be present. Mr. Frank Seaman, representing 5016 shares. Mr. George H. Robinson, representing 100 shares; Wm. C. Spencer, representing 60 shares; Mr. Wm. G. McAdoo, representing 40 shares; Mr. George V. Seaman, representing 9 shares, F. J. Dunham, representing 446 shares; Richard J. Sheridan, 1 share. S. D. Lee, 200 shares. O. D. LaDow, 84 shares.

The proof of the proper notice of the meeting was presented and filed.

Upon motion of Mr. McAdoo the following inspectors of election were elected to serve: Frances Crouch elected at the last meeting, Mr. Emil Modick and Mr. Paul Modick.

There being no reports of committees the election of directors was taken up. The resignation of Lillie H. Seaman as a director was accepted and filed, and Mr. William C. Spencer was nominated to fill the vacancy. The nominations were closed, and the inspectors proceeded to take the ballot of the meeting. 331

Thereupon the inspectors opened the polls and the stockholders proceeded to vote for directors, with the following result: Mr. Wm. C. Spencer, 5956 ballots. Mr. Wm. C. Spencer was declared elected to the foregoing vacancy.

A discussion arose as to the condition of the company and as to its reorganization and recapitalization, as a result of which Mr. McAdoo offered the following resolution, namely, that the Chair appoint a committee of four for the purpose of considering and reporting to the board of directors a plan of reorganization and also of considering the question of selling this company to another company, and that the chairman shall be ex-officio a member of such committee 332

The resolution was unanimously agreed to, and the Chairman appointed to serve with himself Mr. Robinson, Mr. McAdoo and Mr. Dunham.

Upon motion of Mr. McAdoo it was resolved, That the report of the president (for which the report made by Mr. Wiggin had been substituted, be received, approved and spread upon the minutes.

After some further discussion under the head of miscellaneous business the meeting of the stockholders on motion of Mr. Robinson, duly seconded and carried, was declared adjourned. 333

Plaintiff's Exhibit N.

Minutes of a special meeting of the Board of Directors held in accordance with the by-laws at the office of the company at 874 Broadway, New York, in the 31st day of January, 1899, at 4 o'clock P. M.

334

The president of the company, Mr. LaDow, took the chair and called the meeting to order.

Upon a call of the roll all of the directors, Mr. O. D. LaDow, William C. Spencer and Frank C. Dunham were found to be present.

Upon motion, duly made seconded and carried Mr. Wm. C. Spencer was elected temporary secretary of the meeting.

The following notice of meeting, service of which was duly acknowledged by all the directors was then read and ordered spread upon the minutes.

335

"Notice of a meeting of the board of directors. Please take notice that a meeting of the board of directors of the National Gramophone Co. will be held at the office of the Company 874 Broadway, New York on the 31st day of January, 1899 at 4 o'clock P. M. for the purpose of electing officers at transacting all such business as may properly come before the meeting.

Dated, the 30th day of January, 1899."

Signed O. D. LaDow, Secretary. Service of the above notice acknowledged this 30th day of January, 1899.

Signed Wm. C. Spencer, F. C. Dunham, O. D. LaDow.

The Secretary then read the minutes of the preceding meeting of the board of directors held on the 10th day of January, 1899, and upon motion, duly made, seconded and carried the same were approved.

336

Upon motion, duly made, seconded and carried, it was Resolved. That the meeting proceed to the election of officers for the ensuing year.

Mr. F. J. Dunham was nominated for president. The nomination being duly seconded and a vote being taken Mr. Frank J. Dunham was unanimously elected for the ensuing year.

Mr. O. D. LaDow was nominated for Secretary and the nomination being duly seconded and a vote being

taken Mr. O. D. LaDow was unanimously elected secretary for the ensuing year. 337

Mr. Frank Seaman was nominated for treasurer and the nomination being duly seconded and a vote being taken Mr. Frank Seaman was unanimously elected treasurer for the ensuing year.

Thereupon the president of the meeting declared that Frank J. Dunham had been unanimously elected president, Mr. O. D. LaDow unanimously elected Secretary and Mr. Frank Seaman had been unanimously elected treasurer of the company for the ensuing year.

Thereupon the president presented to the meeting a report of a special committee appointed by the stockholders annual meeting held on the 17th day of January, 1899, in reference to the advisability of selling and conveying all of the property, rights, privileges and franchises of this company. 338

Upon motion duly made, seconded and carried the said report was in all respects approved and the same was thereupon ordered on file and the secretary was ordered to cause same to be spread upon the minutes.

Report of a special committee of the stockholders, New York, January 30, 1899. To the Board of Directors of the National Gramophone Co.

The undersigned committee appointed by the stockholders at the annual meeting on the 17th inst. to report on the advisability of selling and conveying all of the property, rights, privileges and franchises of this company begs to report as follows: That as the sale upon the terms hereinafter outlined would, in the opinion, of your committee be desirable and for this purpose the committee suggests: 339

1. The organization of a company under the laws of the State of New York with an authorized capital of \$800,000, all of which shall be stock divided into 8000 shares of the par value of \$100 each.

2. The name of the new company shall be The National Gramophone Co.

340 3. That the property, rights, privileges and franchises of said National Gramophone Co. shall be transferred and delivered to The National Gramophone Co., in consideration of \$800,000 full paid capital stock of the National Gramophone Co. and the assumption by The National Gramophone Co. of such debts and liabilities of such National Gramophone Co. as shall be specifically mentioned in a schedule thereof to be made and exhibited at the time of said transfer.

341 4. That \$600,000 of said full-paid stock of The National Gramophone Co. shall be delivered to the stockholders if said National Gramophone Co. in exchange for their present holdings in the proportion of three dollars of stock of the National Gramophone Co. for one dollar of stock of said National Gramophone Co.

5. The remaining \$200,000 of full paid stock of the National Gramophone Co. shall be returned to the treasurer of The National Gramophone Co., to be sold and disposed of in such manner as the Board of Directors of said National Gramophone Co. may determine to be for the best interests of the Corporation.

342 We suggest that a special meeting of stockholders for the purpose of acting upon this plan be called in conformity with section 33 of the stock-corporation law to be held on 16th day of February at 3:30 o'clock P. M. at the office of this Company, No. 874 Broadway.

Signed

G. H. Robinson.

F. J. Dunham.

W. G. McAdoo, Jr.

On motion of W. C. Spencer, seconded by F. J. Dunham, the following resolution was unanimously adopted. Resolved. That the recommendations of

the committee as above outlined be and the same are hereby approved and that a special meeting of the stockholders of this company be and the same is hereby called for the 16th day of February, 1899 at 3.30 P. M. at the offices of the company, 874 Broadway, New York City, for the purpose of voting on a proposition to sell and convey the property, rights, privileges and franchises of this company. 343

On motion the meeting adjourned.

Plaintiff's Exhibit O.

New York, Feb. 16, 1899. A special meeting of the stockholders of the National Gramophone Co. was held this day at 3.30 o'clock P. M. in the office of the company 874 Broadway. 344

The president, Mr. Frank J. Dunham called the meeting to order.

Upon a roll call of stockholders the following stockholders were found to be present, representing the number of shares set opposite their respective names:

Daniel A Stewart	12 shares	
Wm. C. Spencer	446 shares	
W. G. McAdoo	40 shares	
O. D. LaDow	84 shares	
George D. Seaman	20 shares	
Frank Seaman	4833 shares	345

The following stockholders duly appeared by proxy, representing the number of shares set opposite their respective names.

Sarah F. McAdoo, proxy in favor of W. G. McAdoo, 80 shares

Lillie H. Seaman, proxy in favor Frank Seaman, 800 shares

346 Each of the above proxies were separately examined and found to be in due and regular form, and was ordered on file.

The Secretary reported that due notice of the time and place of the meeting had been waived in due form by each and every stockholder of record of the National Gramophone Co. and the waivers were placed on file.

The Secretary reported that due notice of the meeting had also been given to the stockholders by mailing to each to his last known post-office address a copy of the notice of the meeting and that all the stockholders had signed and returned to him a waiver of notice of the meeting and consent to the holding thereof.

347 The Chairman reported that 6415 shares out of a total of 8000 shares were represented. This being more than two-thirds of the capital stock of the company, as required by the by-laws the meeting was duly organized and proceeded to business. The minutes of the preceeding meeting of the stockholders held on the 17th day of January, 1899, were read and on motion duly made seconded and carried they were approved.

348 The president reported that at the annual meeting held on the 18th day of January, 1899, a committee was appointed to consider and report to the board of directors their conclusions as to the advisability of selling the property, rights and franchises of this company; that committee reported to a meeting of the Directors held on the 31st day of January, 1899 and the action of the directors and their recommendations are embodied in the following report.

(Here follows copy of agreement, as incorporated in directors' meeting, as above.)

Upon motion, duly made seconded and carried the foregoing agreement was unanimously approved, adopted and ordered on file.

Upon motion duly made, seconded and carried it was resolved that the directors be and they hereby are authorized and empowered to sell and convey the property, rights privileges and franchises of this company, as proposed in the foregoing report of the directors and to have such deeds, bills of sale, deeds of assignment, etc., executed and delivered by the president and secretary of this company as may be necessary and requisite in the premises, and resolved. That upon the consummation of the sale, as aforesaid, the stock received in consideration thereof shall be distributed and disposed of by the directors in conformity with the recommendations contained in paragraph two of the foregoing report of the directors. 349

A full vote on this resolution was demanded, whereupon the Secretary reported as follows: 350

For the resolution 6403 shares

Against the resolution 12 shares

On motion of Mr. McAdoo the meeting adjourned at 4:30 P. M.

O. D. LADOW.
Secretary.

Plaintiff's Exhibit P.

New York, March 31st 1899. 351

A meeting of the Board of Directors of the National Gramophone Co. was held at the offices of the Company, 874 Broadway, New York, on the 31st day of March, 1899, at 11 o'clock A. M.

The president of the company, Mr. F. J. Dunham, took the chair and called the meeting to order.

Upon the call of the roll the following directors were found to be present: Frank J. Dunham, Wm. C. Spencer and O. D. LaDow.

352 The Secretary reported that notice of the time and place had been given to each of the directors, who had acknowledged personal service thereof.

Upon motion, duly made, seconded and carried the said notice was ordered on file and the secretary was requested to cause the same to be spread upon the minutes of the meeting:

"Please take notice that a meeting of the Board of Directors of the National Gramophone Co. will be held at the office of the company, 874 Broadway, N. Y. City on the 31st day of March, 1899, at 11 o'clock A. M., for the purpose of transacting all such business as may properly come before the same.

Dated, the 27th day of March, 1899.

Signed, O. D. LADOW,

353 Due service of the foregoing notice acknowledged by each of the undersigned on this 27th day of March, 1899.

O. D. LADOW.
FRANK J. DUNHAM
WM. C. SPENCER.

The Chairman reported that all of the directors were present and that the meeting was competent to proceed to business.

The minutes of the last preceeding Board meeting were read by the secretary; and upon motion of Mr. LaDow duly seconded and carried the same were approved.

354 The Secretary then presented to the meeting a copy of the agreement entered into between the National Gramophone Co. and The National Gramophone Corporation of New York, whereby the property rights, privileges and franchises of this company were transferred to the National Gramophone Corporation of New York in accordance with the authority conferred upon the Directors by the stockholders of this Company.

Upon motion duly made, seconded and carried the said agreement was ratified, approved and confirmed and the Secretary was directed to cause the same to be spread upon the minutes. 355

Copy of Agreement.

Memorandum of agreement made and entered into this 31st day of March, 1899, by and between the National Gramophone Co. a corporation existing under the laws of the State of New York, and the National Gramophone Corporation, likewise existing under the laws of the State of New York. For the consideration hereinafter named the National Gramophone Co. sells, transfers and conveys to the National Gramophone Corporation of New York all the property, rights, privileges and franchises of such National Gramophone Co. of whatever kind and character and wherever situated subject to the debts enumerated in the schedule hereto annexed and marked Exhibit A and subject also to the provision that all transactions of the National Gramophone Co. from and after the first day of March, 1899, shall be treated as and for the account of the National Gramophone Corporation of New York subject to all the benefits and liabilities thereto or arising therefrom. 356

The consideration of the said conveyance is the delivery of the stockholders of the National Gramophone Co. of \$800,000 par value of the full paid and non-assessable stock of said National Gramophone Corporation of New York. 357

Said National Gramophone Corporation accepts such transfer and conveyance upon the terms mentioned in paragraph 1 and 2 hereof and agrees to issue and deliver said \$800,000 of full paid and non-assessable stock in consideration thereof and expressly assumes the debts and obligations in the schedule marked Exhibit A annexed hereto and agrees that

- 358 all transactions from and after the first day of March, 1899, shall be treated as for the account of such National Gramophone Corporation of New York subject to all the benefits and liabilities arising therefrom and incident thereto. The said National Gramophone Co. hereby agrees upon the issuance of the said \$800,000 of full paid, non-assessable stock as is hereinbefore provided to cause to be returned to said National Gramophone Corporation of New York \$200,000 of said full-paid, non-assessable stock to be held by the National Gramophone Corporation of New York as treasury stock, the same to be sold or disposed of at such time or times and upon such terms and in such manner as the Board of Directors of said
- 359 National Gramophone Corporation of New York may deem for the best interests of said Company or its stockholders.

In witness whereof the parties hereto have caused these presents to be signed in duplicate by committees of their respective Boards of Directors thereunto specially authorized this 31st day of March, 1899.

THE NATIONAL GRAMOPHONE COMPANY

Signed, O. D. LADOW,

WM. C. SPENCER,

F. J. DUNHAM,

Directors.

The National Gramophone Corporation of New York. 361
 By Charles B. Seabury
 W. A. S. Clark
 Francis Burroughs
 Committee Directors

Exhibit A. National Gramophone Company.

Liabilities March 1, 1899.

Bills payable and sundry creditors.

Frank Seaman.

Bills Payable,	\$30,085.75	
Account	19,303.70	\$49,389.45

Mrs. L. Seaman

Bills Payable,	11,000.	362
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Ewen McIntyre

Bills Payable,	2,035.
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Duranoid Mfg. Co.

Bills Payable,	500.	
Account	26.40	526.40

The Outlook Company

Bills Payable,	570.77
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J. B. Walker

Bills Payable,	1,250.
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H. C. Underwood Mfg. Co.

Bills Payable,	191.94	
Account	38.35	238.29 363

Martin B. Brown

Bills Payable,	542.50
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Winthrop Press

Bills Payable,	364.50	
Account,	120.00	484.50

E. R. Johnson

Bills Payable	750.
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364	S. S. McClure Co.		
	Bills Payable,		1,182.
	J. H. Warner,		
	Bills Payable,		308.50
	F. Seaman, Berl. Gram. Co.		
	Bills Payable,	1,480.	
	Account	326.03	1,806.03

Sundry Creditors.

	Carrol Box & Lumber Co.	59.75
	Edison Electric Illuminating Co.	10.50
	Library Bureau	47.92
	H. C. Hodgins	6.45
365	N. Y. Roll Wrapping Co.	20.04
	Mercantile Stat. & Print. Co.	59.74
	The Churchman	100.00
	Forum Publishing Co.	25.00
	Clarence Fawc	7.00
	Carey Mfg. Co.	10.00
	Brooklyn Life Publishing Co. Ltd.	32.40
	D. A. Patton	.05
	W. J. Blair	2.00
	Henry Honig & Son,	18.75
	Wyckoff, Seamans & Benedict,	4.08
	Charles Scribner & Son	410.00
	Review of Reviews	459.00
	Munn & Co.	16.76
	Stewart Warner & Co.	24.40
366	Allen Advertising Agency	86.37
	Vogue	80.00
	Journal Newspaper Co.	16.67
	The Public Opinion	73.15
	A. B. Kean & Co.	.75
	S. Leopold	32.50
	Arthur Mountain & Co.	36.00
	Baptist Union	86.09
	Christian Herald	303.20
	The Church Standard Co.	106.80

Christian Work	106.18	367
Robert Gair	77.00	
Hunter & Whitcomb	26.50	
Graham Bros.	2.69	
Kayton & Kramer	36.83	
Ramshorn	31.42	
O. Van Severhault	.35	
The Watchman Publishing Co.	90.00	
The Recreation	240.00	
Milton Rathbun	\$ 2.48	
The Silver Cross	69.45	
Christian Intelligence Association	60.00	
S. G. Lindeman	69.00	
Chautauqua Assembly	114.00	
Morning Telegraph	35.00	368
Crane Bros.	22.50	
Wm. Allen & Co.	9.00	
A. B. Dick & Co.	2.25	
Our Day	25.00	
Life	100.80	
Strand Magazine	37.50	
American Home Magazine	37.65	
Short Stories	5.00	
Sunday Telegraph	28.00	
College Athlete	25.00	
Womens Home Companion	141.30	
Hamilton, Royce & Co.	20.00	
Items of Interest	15.00	
L. F. Crumb	1.10	
Lee & Tetlher	41.00	369
W. R. Ostrander & Co.	.75	
Self Culture	16.25	
Home Magazine	120.00	
Illustrated American	157.80	
Home Decorator & Furnishing Co.	11.25	
N. Y. Foremens Cycle Co.	10.00	
Morris European Express Co.	5.25	
Secretary State of New York	3.40	
George D. Beinert	1.00	

370	Harpers Weekly	168.75
	Scientific American	220.05
	North American Review	25.00
	Literary Digest	67.98
	A. T. Smith	4.75
	C. H. Ditson & Co.	2.00
	Brooklyn Citizen	100.00
	Leisure Home	92.00
	Harlem Life	20.70
	Irish World	90.00
	Herald & Presbyter	29.16
	Epworth Herald	124.95
	Congregationalist	68.00
	Garvin Machine Co.	184.30
371	Charles H. Hinds	22.10
	National Magazine	33.34
	Men	37.50
	American Surgical, Medical Bulletin	50.00
	Field & Stream	36.00
	American Magazine	35.00
	Lippincotts	56.25
	Total	<u>\$75,425.86</u>

Debit Balances.

	Western Union Tel. Co.	\$ 1.25
	Pierce Underwood Co.	14.50
	The Interior	31.39
372	H. P. Phelps	6.00
	J. D. Butler	200.00
	J. C. Metzgar & Co.	.40
	Philip Phelps & Sawyer	100.00
	H. J. McCormick	132.50
	G. L. Cheney	100.00
	Empire Electric Sign Co.	295.00
	Waldo G. Morse	175.00
	A. L. Forestier & Son	107.00
	The Music Trade Co.	15.00

Morris, Grau Opera Co.	250.00	373
Montgomery & Co.	28.64	
	\$ 1,456.58	
Balance	\$73.969.18	

Upon motion duly made and seconded and carried, it was Resolved. That in the opinion of this Board of Directors, it is advisable to dissolve corporation forthwith, pursuant to section 57 of the Stock Corporation Law, and that a meeting of the stockholders be called to be held at the New York offices of the corporation, No. 874 Broadway, on the seventeenth day of May, 1899, at twelve o'clock noon, for the purpose of voting upon a proposition that the corporation be dissolved forthwith. 374

Resolved, further, that the secretary cause notice of such meeting to be both published and served or mailed according to law, that the secretary or treasurer and President or vice-president of the corporation execute a certificate showing the adoption of this resolution and setting forth the proceedings of the meeting to be held by the stockholders, and that they also attest the written consent of the stockholders of said corporation that the said corporation be dissolved.

Resolved, further that such officers cause such certificate and consent with the powers of attorney if stockholders executing such consent by attorney to be filed in the office of the secretary of State together with a duly verified statement of the names and residences of the existing Board of Directors and the names of the officers of the corporation and proofs of publication and service of all statutory notice. 375

Upon motion, duly made, seconded and carried the meeting adjourned.

O. D. LADOW,
Secretary.

~~Exhibit A, with Answer.~~

CERTIFICATE OF INCORPORATION.

OF

NATIONAL GRAMOPHONE COMPANY.

We, the undersigned, desiring to form a corporation pursuant to the provisions of the Business Corporation's Law, all being of full age, citizens of the United States, and residents of the State of New York, do hereby certify:

First.—The name of the proposed corporation, is National Gramophone Company.

Second.—The purposes for which it is to be formed, are: to purchase and take over a contract or contracts for the sale and introduction of gramophones, and the license, exclusive or other, to introduce and sell the same, granted, or which may be hereafter granted by the Berliner Gramophone Company, a corporation organized and doing business under the laws of the State of Virginia, or any other corporation or person for the introduction of any gramophones, for the exclusive manufacture, sale or use whereof said company or companies, person or persons, may own patents, issued by the United States of America, or of any other similar instrument or instruments, for recording or reproducing sounds; to manufacture own, sell, lease and operate gramophones, gramophone goods, and other appliances, useful in, or connected therewith; to purchase and own material to be used in the manufacture, production or operation thereof; to own, hold and control patents, United States and foreign, issued and to be issued for, and upon such articles, and upon processes and systems for the manufacture or production thereof, or the accomplishment of results produced thereby; to license others to prosecute such business and use said inventions and appliances, so far as may be consistent with the right which may be acquired by it; to introduce and exploit such inventions and manufactures, and to own and control patents, inventions and discoveries, useful for that purpose; to manufacture, deal

in, and sell articles which may be manufactured, and buy and sell articles which may advantageously be bought and sold in connection with said business; to purchase and sell machinery and other property, necessary or convenient in the transaction of the business of this company; to own, control, sell and deal in stocks and bonds of corporations, using such machines, appliances, inventions; to deal in or with them or any of them, so far as this may be done, in accordance with the laws of the State of New York, and as shall be useful or advantageous in conducting the business of the company; to buy or lease lands and buildings for the conduct of such business, and mortgage, lease or sell the same if expedient; to raise means, for the conduct of such business, by the issuing of bonds or other obligations, and to mortgage for that purpose, the charter and franchises of this corporation; and in general, to do and perform any and all acts, and negotiate and carry out any and all contracts and arrangements, which shall be deemed by its directors officers necessary, convenient or advantageous therein or thereto.

Third.—The amount of the capital stock is Fifty thousand (50,000) Dollars.

Fourth.—The number of shares of which the capital stock shall consist is five hundred (500), and the amount of capital with which said corporation will begin business is fifty thousand (50,000) Dollars.

Fifth.—The location of its principal office is to be in the City of Yonkers, County of Westchester and State of New York, and its business is also to be carried on in the Cities of New York and Brooklyn, and throughout the United States of America.

Sixth.—Its duration is to be fifteen years.

Seventh.—The number of its directors is to be three.

Eighth.—The names and post-office addresses of the directors for the first year are as follows:

NAMES.	POST-OFFICE ADDRESSES.
Frank Seaman,	Yonkers, New York.
Harry Bentz,	113 West 76th Street, New York, New York
William B. Owen,	1 Grammercy Park, New York, New York.

Ninth.—The names and post-office addresses of the subscribers, and the number of shares which each agrees to take in the corporation are as follows:

NAMES.	POST-OFFICE ADDRESSES.	NUMBER OF SHARES.
Frank Seaman,	Yonkers, N. Y.	498
Harry Bentz,	New York City, N. Y.	1
William B. Owen,	New York City, N. Y.	1

In Witness Whereof we have made, signed and acknowledged this certificate this 19th day of October, 1896.

FRANK SEAMAN.
HARRY BENTZ.
WILLIAM BARRY OWEN.

CITY AND COUNTY OF NEW YORK, }
STATE OF NEW YORK, } ss.

On this 19th day of October, 1896, before me the subscriber, personally came Frank Seaman, Harry Bentz and William B. Owen to me known, and known to me personally to be the individuals described in, and who executed the foregoing certificate, and severally acknowledged that they executed the same.

[SEAL]

F. C. HARDY,
Notary Public, Kings Co.
Certif. filed in N. Y. Co.

CITY AND COUNTY OF NEW YORK, } ss.
STATE OF NEW YORK,

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court of the said City and County, the same being a Court of Record, do hereby certify, That F. C. Hardy has filed in the Clerk's Office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe the signature to the said certificate of proof or acknowledgment to be genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24 day of Oct., 1896.

HENRY D. PURROY,
Clerk.

Indorsed:—The National Gramophone Company. Certificate of Incorporation.

Tax for privilege of organization
of this Corporation.

\$62.10

Under Chapter 908, Laws of 1896.
Paid to
State Treasurer before Filing.

STATE OF NEW YORK,
OFFICE OF SECRETARY OF STATE,

Filed and recorded Oct. 28, 1896.

ANDREW DAVIDSON,
Deputy Secretary of State.

388 State of New York,
Office of the Secretary of State. } ss.:

I have compared the preceding with the original Certificate of Incorporation of National Gramophone Company, filed and recorded in this office on the 28th day of October, 1896, and do hereby certify the same to be a correct transcript therefrom and the whole of said original.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this seventh day of December, one thousand nine hundred and seven.
(Seal.)

JAMES L. WHALEN,
Deputy Secretary of State.

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Defendant's Exhibit 1.

Extract from the minutes of the Regular monthly meeting of the Board of Directors of the National Gramophone Corporation, held at its offices, 874 Broadway, in the City of New York, March 10th 1900.

* * * * *

The Secretary made a general statement as to the supply of Gramophones, and Mr. Robinson thereupon offered the following resolution which was unanimously agreed to:

390 That the Executive Officers of this Corporation are hereby authorized to make the necessary arrangements with the Universal Talking Machine Company for the placing of their type of talking machines, on the market, provided Mr. Seaman, for any reason, finds himself unable to comply with his contract as to the furnishing of Gramophones to this Corporation or to deliver such goods as this Corporation may require to fill its orders.

* * * * *

Defendant's Exhibit 2.

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Minutes of the regular meeting of the Board of Directors of the National Gramophone Corporation, held at the offices of the Corporation, 2874 Broadway, New York City, April 2nd, 1900.

Present: Messrs. Dunham, Robinson, Morse and La Dow.

Minutes of the meeting of March 10th were read and on motion of Mr. Robinson, duly seconded and carried, they were approved.

On motion of Mr. Robinson, duly seconded, it was unanimously resolved that a dividend for the preceding quarter, of two per cent. be declared from the earnings of the Corporation, such dividend to be paid, on May 1st, proximo; and that the transfer books be closed ten days previously to the same.

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The Secretary reported on several matters relating to foreign business, and these various matters were fully discussed.

Upon motion of Mr. Morse, seconded by Mr. Robinson, it was unanimously resolved that, whereas Mr. Frank Seaman has been unable to supply this Corporation with such goods as are required for the filling of its orders, a demand having been made upon him for such goods, with which demand he has been unable to comply now, therefore, be it resolved, that the Executive officers be and they hereby are authorized to purchase and ship such goods to be procured from other persons as may be required to carry on the business of this Corporation.

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There being no further business, on motion of Mr. Robinson, the meeting adjourned in due form.

O. D. LA DOW,

Secretary.

Defendant's Exhibit 3.

Consisting of Bill of Complaint, Exhibits and Affidavits in the suit brought in the United States Circuit Court, District of New Jersey, by Frank Seaman (the defendant herein) on his own behalf and in behalf of the United States Gramophone Company and Berliner Gramophone Company, complainants, against the Victor Talking Machine Company, defendant, for an injunction and accounting by the defendant of certain profits earned or received by it by reason of its unlawful use and sale of apparatus and things relative to sound recording or reproducing, having and containing the devices and things patented by letters patent No. 564,566, the exclusive right to make, use and vend which was legally vested in the complainants; and other relief usually prayed in suits in equity for the enforcement of U. S. letters patent. The bill of complaint contains in regard to the joinder of parties the following allegations:

XXI. That your orator Frank Seaman has duly requested your orators the United States Gramophone Company and the Berliner Gramophone Company to join with him in the prosecution of this suit and in the enforcement of the rights of your orators herein, but that your orators, the said companies, have declined and refused so to do, wherefore, under and pursuant to said contracts and agreements, and in accordance with the rights of your orator Frank Seaman, he has, and your orators, the said companies, have through him joined as complainants and bring this their bill against said defendant, causing the same to be duly signed by and on behalf of your orators, and to be verified by your orator Frank Seaman.

Defendant's Exhibit 3-A.

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Bill of Complaint, Exhibits and Affidavits similar to Defendant's Exhibit 3, except that the patent involved is No. 548,623.

Defendant's Exhibit 3-B.

Bill of Complaint, Exhibits and Affidavits similar to Defendant's Exhibit 3, except that the patent involved is No. 534,543.

Also, two bound volumes containing the printed records of suits instituted by and against the defendant Frank Seaman under or by reason of his contract of October 10, 1896, (Plaintiff's Exhibit D) with the Berliner Gramophone Company, as follows:

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Transcript of Record.

The United States of America. }
Western District of Virginia. } to wit:

At a Circuit Court of the United States for the Western District of Virginia, an adjourned Term, held at Harrisonburg, in said District, on Thursday, the first day of November, A. D. 1900.

Present: Hon. John Paul, Judge of the Western District of Virginia.

Among others were the following proceedings, to wit:

IN EQUITY.

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Frank Seaman, a citizen and resident of the State of New York. Complainant

vs.

The Berliner Gramophone Company, a Corporation organized under and by virtue of the laws of the State of Virginia, and a resident of the said State, having its principal place of business in the City of Roanoke, in said State, Defendant.

BILL OF COMPLAINT.

IN EQUITY.

Frank Seaman, Plaintiff,

against

Berliner Gramophone Company, Defendant.

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF VIRGINIA:

Frank Seaman, a citizen of the State of New York, residing in the city of Yonkers in said State, brings this his bill against the Berliner Gramophone Company, a corporation organized under and by virtue of the laws of the State of Virginia, and having its principal place of business in the city of Roanoke, in the State of Virginia, and thereupon your orator complains and says:—

I. That the defendant, the Berliner Gramophone Company, is a corporation chartered and organized under and by virtue of the laws of the State of Virginia, and having its principal office and place for the transaction of business in the city of Roanoke in said State.

II. That heretofore and prior to the tenth day of October, 1896, the defendant acquired and secured under and by virtue of certain agreements made and executed by and between the United States Gramophone Company, a corporation organized under and by virtue of the laws of the State of West Virginia,

and one William C. Jones, which contracts are dated on the second day of September and the fourth day of October, 1895, respectively, and under and by virtue of another certain agreement dated on the second day of September, 1895, by and between one Emil Berliner and said William C. Jones, the rights secured by said Jones under all said agreements having been duly transferred to the defendant herein; the exclusive right to manufacture, vend, and use under the patents and rights of said Emil Berliner, as in said contracts, copies whereof are hereunto annexed in Exhibit A, and made a part hereof, is more fully set forth, and by reference to which will more fully and at length appear, a certain invention, device, or machine known and described in said patents and contracts, and known to commerce as the gramophone.

Folio 4.

" 5.

III. That the defendant likewise before such tenth day of October, 1896, having entered upon the manufacture and sale of talking and sound-reproducing machines so known as gramophones, under and pursuant to such contracts, agreements, or license, your orator contracting with defendant, became and was interested in the sale and disposition of the same within the State of New York, and elsewhere, and was engaged in the business of selling and introducing such machines.

IV. That thereafter and on or about said tenth day of October, 1896, your orator and the defendant herein duly made and entered into a certain contract, or agreement, dated on that day, a copy whereof is hereunto annexed marked "Exhibit A," and made part hereof, the original being in the possession of your orator and ready to be produced to the court. That such agreement was duly sealed by the parties thereto with their respective seals, and was likewise signed in the name of the defendant by Thomas S. Parvin, its president, pursuant to a vote of its board of directors duly authorizing him so to do, and by your orator individually, and to such agreement, as a part of the same, were duly annexed copies of said agreements so as aforesaid executed by and between the

" 6.

" 7.

United States Gramophone Company and Emil Berliner and William C. Jones, dated as aforesaid, and likewise a receipt for the sum of two thousand four dollars, signed by the defendant, and a letter dated on the same day, expressing the conditions upon which said agreement should be signed and delivered, and also, and thereafter, a receipt for the sum of three thousand nine hundred ninety-six dollars dated on the 12th day of October, 1896, signed by the defendant, copies of all of which are hereto annexed and made a part hereof, and the originals whereof are in the possession of your orator and ready to be produced to the court; the payments recited whereby and the terms and conditions specified wherein having been fully and in all respects made, performed and complied with by your orator, and the moneys specified whereby having been accepted, received and applied to its own use by the defendant.

V. That said agreements provided, among other things, that the defendant should manufacture solely for, and sell exclusively to, your orator, the gramophones and gramophone goods so as aforesaid controlled by it and for the manufacture and sale whereof it held the exclusive license under the patents and contracts hereinbefore set forth, and that your orator should purchase large quantities thereof, and should sell and distribute the same, all as in and by said contract is fully and at length set forth.

VI. That under and by virtue of patents of the United States of America, as aforesaid, the defendant possessed the sole and exclusive right to manufacture, vend, and use in the United States of America, as specified, the gramophone and gramophone goods aforesaid, which said right is in and by said agreement acknowledged and conceded by your orator, and is now, and for many years to come will be, the sole and exclusive property of said defendant, and as provided by said agreement, that of your orator and of the various heirs, executors, administrators, successors, and assigns of the parties, as in and by said contract and by law is provided, the same being of great value.

VII. That upon and after the execution and delivery of said agreement your orator entered actively upon the business therein described, and agreed to be conducted and at once engaged in carrying out the terms and provisions of the said agreement on his part specified to be performed, and purchased and paid for large amounts of goods manufactured by the defendant under said patents and delivered by it to your orator pursuant to the terms of said agreement. Folio 11.

VIII. That in so doing your orator spent and caused to be spent great sums of money in advertising and introducing such goods and building up a market for the same and purchased from the defendant goods of great value which have been fully paid for by him as follows:— " 12.

During the year 1897	\$88,611 14
During the year 1898	239,849 58
During the year 1899	188,966 59
During the months of January, February, March, April and May, 1900	94,457 93

IX. That in addition to such amounts so paid for gramophones and gramophone goods purchased from the defendant under said contract, your orator has paid to the defendant for artists, musicians, and others employed by it for the purpose of making and producing matrices, stamps, or dies, during the year 1899, and said four months of the year 1900, the sum of \$12,583.55, and likewise has paid to defendant to be used by it in making and finishing such matrices, stamps, or dies, and preparing them for the manufacture and production of sound records or disks, during such period the sum of \$7,234.16, and that pursuant to such contract the defendant charged upon all such disbursements and expenses a profit of forty per cent. upon all amounts paid out by it, and which constitutes a part of the aforesaid sums paid by your orator, and also during such times your orator has paid to the defendant for the rent of premises in the city of Philadelphia, the sum and amount of eighty-three dollars per month, one- " 13. " 14.

third of said premises being occupied by your orator as a storehouse, and two-thirds thereof being occupied by defendant in the production of matrices and the operations connected therewith at the expense and for the account of your orator.

X. That in the operation of said gramophone so as aforesaid invented, patented, and controlled by said Berliner, and the rights under patents whereupon have been, as aforesaid, transferred to the defendant and contracted to your orator; any recitation, declamation, talk, music, or other sound, which it is desired to reproduce mechanically, is first delivered into what is known as a recording apparatus, wherein the impact of such sound upon a diaphragm causes waves to be recorded upon a revolving disc. The waves thus recorded are by mechanical and chemical processes fixed, and therefrom a matrix, or die, is produced by mechanical and chemical processes. The die thus made is hard and from the same are stamped from time to time such disks as may be required. These disks are known and designated in the contract aforesaid and are generally known as "records." When it is desired to reproduce any of the sounds so fixed upon a record as aforesaid, the same is placed upon a gramophone, or machine manufactured under and pursuant to such patents, and caused to revolve, and by mechanical means the waves so produced by the recording machine described, and reproduced and transferred to such record, actuate a needle in the gramophone, which in turn actuates a suitable diaphragm and thereby the original sound is reproduced by the gramophone, and becomes audible.

XI. That the manufacture and production of records, so as aforesaid, controlled and by said contract reserved to itself by defendant, was and is in its perfect, elaborated and commercially valuable form a difficult, unknown, and secret process incapable of being carried out or performed by plaintiff and known only and exclusively to defendant.

XII. That such sums so as aforesaid paid by your orator for the employment of musicians and others, and for the

manufacture of matrices, were expended and employed by defendant for your orator for the purpose of furnishing records, as aforesaid, for sale and use with such gramophones as your orator might sell or had sold, or from time to time might have sold. And that such gramophones, or sound reproducing machines without such records are wholly inoperative and of no value.

XIII. That such contract provides that your orator shall in no event manufacture or make, or in anywise cause to be made, any such records or matrices, or do anything thereto, and provides that defendant shall fully and exclusively supply him with the same. Folio 19.

XIV. That your orator has in all respects well and truly and according to the letter and spirit of said contract performed the same on his part, but that the defendant has failed and refused, and still refuses, to perform the same on its part.

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XV. That in and during the year 1899, the defendant failed and refused to supply and deliver to your orator gramophones, records and gramophone goods with reasonable dispatch, and as the same were from time to time ordered by your orator, and thereby the ability of your orator to sell and distribute the same was greatly limited and curtailed, and he was and is unable to fill orders which he then and subsequently received, and is constantly receiving, for such machines, records and goods, whereby the number and amount of his sales have been and are greatly lessened and curtailed. 20.

XVI. That in and during the year 1897 your orator purchased from defendant two hundred and forty-eight thousand six hundred and fifty-two records, wherefor he paid to defendant the sum of \$41,266.76. That during the year 1898 your orator purchased 713,753 records, wherefor he paid to defendant the sum of \$110,633.01, and that during the year 1899 your orator purchased from defendant 569,154 records, wherefor 21.

he paid to the defendant the sum of \$91,174.27, and that during the months of January, February, March, April and May, 1900, your orator purchased from defendant 255,784 records, wherefor he paid the sum of \$40,332.87. And that but for such declination and refusal on the part of the defendant to reasonably supply your orator with such goods as ordered he would have purchased such records far in excess of such numbers, and would have paid far greater amounts than thus above set forth.

XVII. That the defendant has in its possession great numbers of matrices made so as aforesaid for your orator and at his expense, and likewise has in its possession various and numerous records so as aforesaid stamped from such matrices finished and ready for delivery to your orator, but the exact numbers and character whereof are unknown to your orator. That from such matrices defendant is engaged in stamping, and is threatening to continue to stamp great numbers of records, not for the use or benefit of your orator, but for the use and benefit of the defendant and for the purpose of selling the same to the customers of your orator and to other persons to whom it is threatening to dispose of the same to the irreparable loss and damage of your orator and the subversion of his said business.

XVIII. That your orator subsequently to the 18th day of April, and during the month of May, 1900, ordered large numbers of records from defendant, but defendant wholly failed and refused to deliver the same, although such orders were given in the usual manner for delivering according to the established custom and course of such business, and your orator duly demanded such delivery and the filling of such orders, and said defendant, without making any objection to the sufficiency, regularity, or definiteness of such orders, has refused, and now refuses and wholly declines, to deliver to your orator such or any records. That notwithstanding such declinations and refusals so as aforesaid to deliver records, the defendant continues to use the matrices so as aforesaid

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made, supplied and paid for by your orator in stamping and producing records, thereby wearing out and destroying such matrices greatly to the damage and detriment of your orator, and defendant likewise has continued to employ the talent or persons furnished by your orator to produce such matrices as aforesaid and continues to receive from your orator moneys for the payment of the same, and to send to your orator bills for the amounts paid in obtaining such talent. That the bills so as aforesaid rendered to your orator during the year 1900 are as follows:—

During the month of January	\$666 70
During the month of February	784 60
During the month of March	1452 99
During the month of April	807 05

Folio 26.

" 27.

XIX. That the records so as aforesaid ordered by your orator, and which the defendant has so refused to supply, are in number 19,906, and are of the value, exclusive of the costs of said talent and such matrices at the prices paid by your orator to defendant, of \$3085.43, and are fully and at length designated and described in the manner fixed and determined by defendant, and are set forth in number and places of delivery specified in the list of orders hereunto annexed, and made a part hereof, and marked "Exhibit B."

XX. That various and large numbers of records are constantly required and demanded from your orator by those who have purchased from him such gramophones so adapted to use the same, and your orator is, has been, and will be wholly disabled and incapacitated from supplying to his said customers or to any persons, such, or any, records by reason of such contract and through the declination and refusal on the part of the defendant to supply the records so in part paid for by, and produced for the use of, your orator, and now in the possession of the defendant, and therein and thereby your orator is and will be incapacitated and prevented from selling, dealing in, and distributing gramophones and records now in his possession by reason of the failure and refusal of defendant to replenish, restore, and keep

" 28.

" 29.

complete and up to date his stock, and to furnish, sell, and deliver to your orator such records so as aforesaid produced and to be produced from matrices furnished from talent procured at his request and paid for by him.

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XXI. That your orator has ordered and offered to pay for, and is now ready and hereby offers to take and pay for, large numbers of machines and records under and pursuant to such contract, but that the defendant has refused and now wholly refuses to sell or deliver to your orator machines or records so ordered by him, under and pursuant to such contract, although your orator has in all respects lived up to and performed the terms and conditions of the same on his part.

XXII. That a great and large demand for thousands of such machines and records exists, and your orator desires to supply such demand and to obtain from defendant, and to sell and distribute such machines and records, but he is prevented from so doing, and from carrying on his said business, as hereinbefore specifically averred by such unjust and arbitrary refusal on the part of defendant, to furnish to him said goods.

XXIII. That the profits upon the said business to your orator are and have been very large, and that the damage to your orator and to the business which he has built up as aforesaid, and the loss which has accrued and will accrue to him by reason of such unjust, arbitrary, and wrongful refusal on the part of the defendant to supply such records, is and will be wholly irreparable, and incapable of ascertainment, computation, or determination, vastly in excess of \$2000, to wit: being in excess of \$100,000, and that your orator cannot be compensated in damages for such loss, and that, if the defendant shall continue such unjust and arbitrary refusal to deliver goods under and pursuant to said contract, your orator will lose the whole value and benefit of his business, and will in no way be able to recompense himself for the loss of the same.

XXIV. That such disks or records which are required by Folio 33. your orator for, in, and about the carrying out of said contract, and the conduct of his said business, are already manufactured, and are in the possession of the defendant as aforesaid, and are ready to be delivered. That the same are satisfactory in kind, quality, and condition to your orator, who has ordered and is willing to receive the same and pay therefor, pursuant to said contract, and to continue ordering from time to time, as such records shall be required by him in his said business, and that nothing is required to be done by defendant, saving only the " 34. said delivery of the records to your orator.

XXV. That your orator has demanded from defendant that it furnish to him samples of new records recently made for your orator as it has heretofore and always, until recently, without question, furnished to him under and pursuant to said contract, samples of disks or records produced from matrices so as aforesaid made for your orator, as the same have been from time to time perfected; but that the defendant has wholly failed and refused, and still refuses, to furnish your orator with such samples, although the defendant has required your orator to pay for such matrices, and for the talent so as aforesaid employed in their production, and has rendered and continues to " 35. render to your orator, bills for the same, all of which have been duly paid by your orator, saving only one bill for musical talent employed during the month of April, 1900, amounting to the sum of \$807.05, and which your orator is ready and willing to pay, when the defendant shall furnish samples or shall withdraw its refusal to furnish samples of, or records from the same.

XXVI. That your orator has duly demanded from defendant " 36. a statement of the matrices so made and on hand, and likewise of the records, and that the same be held exclusively to his use and subject to his order, but the defendant has wholly disregarded such request, and has wholly failed and refused to furnish such statement, and in contravention of its said agreement, and of the rights of your orator, is continuing,

and threatening to continue, all of its said unlawful acts, and alleging its rights and authority so to do.

XXVII. That your orator, pursuant to the contract aforesaid made between him and the defendant, has on different occasions demanded arbitration as to disputes which had arisen between your orator and defendant, regarding the interpretation of said agreement of October 10th, 1896, and that defendant has for months ignored such demand. That finally, and on the 25th day of May, 1900, your orator duly demanded that arbitration be had upon the following questions: Whether your orator should be compelled to pay for talent employed by defendants in producing matrices for records, until defendant should furnish your orator samples of records made from such matrices, or assure your orator that it would do so, and would fill orders for records from the same. Whether your orator is entitled to a statement of the matrices made for him and of the records pressed from each. Whether the defendant is under obligation to fill orders for records which your orator has sent to it, which defendant has declined to honor.

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Whether defendant is entitled to charge to your orator's account forty per cent., in addition to the amount paid by it, for talent in making records wherein it has rendered to your orator, the bills for talent employed.

Whether defendant is entitled to use the laboratory maintained at your orator's expense, in making any matrices or records other than those ordered by your orator.

Whether defendant is entitled to use matrices produced from talent ordered by your orator, and charge to his account, except as, and when your orator orders records to be made therefrom.

But that the defendant has failed and refused, and still fails and refuses, to arbitrate such questions or any questions arising under such contract with your orator.

Wherefore, your orator stands in need of equitable relief, having no relief save in this Honorable Court, and prays:—

First.—That your Honors grant to your orator your writ of injunction, special until the hearing, and perpetual thereafter, enjoining and restraining the said Berliner Gramophone Company, the defendant, and all persons claiming to act under its authority, from selling, delivering, or parting with, any of the gramophones, records, matrices, or goods, made by it, in compliance with said contract between the parties hereto, and also any other goods wherein your orator has an interest, to any persons other than those designated by your orator, save in so far as the defendant is reasonably entitled to sell and deliver the same to its stockholders, as provided by said contract. Folio 41.

Second.—That your Honors grant unto your orator your writ of injunction restraining the said Berliner Gramophone Company, the defendant, and all persons claiming to act under its authority, from using or employing said matrices, so as aforesaid manufactured for and at the expense of your orator, in stamping or producing records, other than such as shall be suitable for, and requisite to supply your orator with such records, as he may require, and order from time to time. " 42.

Third.—That your Honors grant unto your orator your writ of injunction commanding the said Berliner Gramophone Company, the defendant, its officers and agents, to forthwith deliver to your orator, the records so as aforesaid stamped from matrices, manufactured for, and at the expense of your orator, and ordered by him, and now ready to be delivered, in compliance with the terms of the contract, entered into between your orator and the defendant, and according to their usual course of business. " 43.

Fourth.—That the said Berliner Gramophone Company, the defendant, may be decreed and required to pay to your orator, full compensation for all loss and damage, which he has sustained by reason of the aforesaid premises.

Fifth.—That the said Berliner Gramophone Company, the defendant, may be decreed and required to render to your " 44.

orator, an account of all matrices and records, now in its possession or under its control.

Sixth.—That your orator may have such other and further relief, in the premises, as the nature of the circumstances of the case may require, and which to your Honorable Court may seem equitable.

May it please your honors, the premises considered, to grant unto your orator not only a writ of injunction issuing out of and under the seal of this Honorable Court enjoining the said defendants as heretofore prayed, but also a writ of subpœna to be directed to the said Berliner Gramophone Company, the defendant, therein and thereby commanding it, at a certain time, and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer make, but not upon oath or affirmation, the benefit of which is expressly waived, by your orator, to all and singular the premises, and further to stand to, perform, and abide by such other orders, directions, and decrees therein, as to this Honorable Court shall seem meet and which may be made against it in the premises, and as shall be agreeable to equity and good conscience.

And your orator will ever pray.

FRANK SEAMAN.

WALDO G. MORSE,
Solicitor for Plaintiff,
10 Wall Street, New York, N. Y.

GEORGE E. SIPE,
Of Counsel, p. q.

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UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.
CITY OF NEW YORK,
COUNTY OF NEW YORK,

On this twentieth day of June, one thousand nine hundred, before me personally appeared Frank Seaman, to me known, and known to me to be the above plaintiff, who made solemn oath that he has read the foregoing bill of complaint, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated, on information and belief, and as to these matters he believes it to be true.

FRANK SEAMAN.

Sworn to and subscribed before me this twentieth day of June, 1900.

[SEAL]

SAM. H. HITCHCOCK,
U. S. Commissioner,
So. Dist. of N. Y.

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contracts with Tate, Jones & Nellis, mentioned in the bill, should any such right of delivery exist—but said injunction shall not take effect until the plaintiff, or some one for him, shall execute and file in this cause, a bond, with security to be approved by this Court, in the penalty of Five Thousand Dollars, conditioned to satisfy and discharge any costs and damages that may be incurred by the defendant by reason of the suing out of said injunction, in case the same shall be dissolved.

Teste:

A. K. FLETCHER,
Clerk.

Mem.: I hereby certify that the bond required above has been executed and filed in the cause of Frank Seaman vs. The Berliner Gramophone Company, this the 27th day of June, 1900.

Teste:

A. K. FLETCHER,
Clerk.

SPA. IN CHY. AND INJUNCTION.

Frank Seaman

v.

The Berliner Gramophone Co.

Serve on The Berliner Gramophone Company,
Roanoke, Va.

To 1st Monday in Aug., 1900.
But not later than July 16, 1900.

WALDO G. MORSE,
GEO. E. SIPE,
P. Q.

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Memo.—Said Subpœna and Injunction was returned as executed by delivering to W. G. Robertson, Attorney and Agent for the Berliner Gramophone Company, at the City of Roanoke, Va., July 27, 1900.

And at another day, to wit, in the Clerk's office of said Court, on the 6th day of August, A. D. 1900, (being the first Monday in August, 1900) came the Berliner Gramophone Company, the Defendant, by Counsel, and filed its Answer to the Plaintiff's Bill, which, together with the exhibits therewith, is in words and figures following, to wit:

— *39 —

Defendant's Answer to Bill.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR
THE WESTERN DISTRICT OF VIRGINIA.

<i>Frank Seaman, Plaintiff,</i>	}	IN EQUITY.
against		
<i>Berliner Gramophone Company,</i>		
<i>Defendant.</i>		

ANSWER OF THE BERLINER GRAMOPHONE COMPANY.

*To the Judges of the Circuit Court of the United States for the
Western District of Virginia:*

The Berliner Gramophone Company, the defendant above named, saving and reserving to itself all, and all manner of exceptions to the manifold errors contained in the bill for answer thereto, or to such parts thereof as it is advised, it is material and necessary for it to answer, says:

1. The defendant admits to be true the first, second, third, fourth, fifth and sixth paragraphs of said bill.

2. The defendant admits the averments of paragraph 7 of the bill, with the qualification that the plaintiff ceased to carry out the terms and provisions of his agreement with defendant, on or before October 2nd, 1899.

3. The defendant admits the averments of paragraph 8 of the bill, except the averment that plaintiff spent great sums of money in advertising; defendant is informed, and therefore avers, that most, if not all of the money spent in advertising the Berliner Gramophone, was spent by the National Gramophone Company and not by Frank Seaman personally.

4. The defendant does not deny the averments contained in paragraph 9.

5. The defendant does not deny that the description of the Gramophone and records contained in paragraph 10 of the Bill is in the main correct.

6. The defendant admits the averments contained in paragraph 11.

7. That it is admitted, as averred in paragraph 12 of the Bill, that the sums paid by plaintiff for the employment of musicians and others, and for the manufacture of matrices, were expended and employed by defendant for plaintiff, for the purpose of furnishing records for sale and use, with such Gramophones as plaintiff might sell, and that such Gramophones, without said records, are wholly inoperative and of no value. Defendant however avers, that plaintiff had no right under the contract, to demand from the defendant the delivery of records, to be used upon other talking machines than the Gramophone.

8. The defendant admits the averments contained in paragraph 13 of the Bill.

9. The defendant denies that plaintiff has in all respects, well and truly, and according to the letter and spirit of the

contract performed the same on his part, and avers that the defendant has well and truly and according to the letter and spirit of said contract performed the same on its part.

10. In October, 1896, plaintiff organized under the laws of New York, a Corporation known as the "National Gramophone Company," the purpose of which was to take over the contract between the Berliner Gramophone Company and plaintiff. The said Company was organized without the approval of the Berliner Gramophone Company, and was never recognized in any way by the Berliner Gramophone Company as having any rights under the contract between it and plaintiff. From the organization of said Company, plaintiff bought Gramophones, Gramophone supplies, and records from the Berliner Gramophone Company, and turned them over to the National Gramophone Company, and said Company sold the same to the trade. In March 1899 the "National Gramophone Corporation" was organized under the laws of New York by the plaintiff, who supplied all the capital, the object and purpose of which was to manufacture and deal in talking machines "particularly the instrument commonly known as, and called Gramophone." The certificate of incorporation of the National Gramophone Company is hereto annexed marked Exhibit A. On June 12th, 1899, the National Gramophone Company was dissolved, and subsequently all of its assets were assigned and transferred to the National Gramophone Corporation. The certificates of dissolution of the National Gramophone Company, and of the organization of the National Gramophone Corporation, are hereto annexed marked Exhibits B and C. The said National Gramophone Corporation was never recognized by the Berliner Gramophone Company as having any right under the contract between the Berliner Gramophone Company and plaintiff. Nevertheless, plaintiff, in violation of his contract, and without the permission of, and against the will of the Berliner Gramophone Company, did, until recently, turn over to the said National

Gramophone Corporation, all or nearly all of the goods which he purchased from the Berliner Gramophone Company, under the contract of October 10, 1896. Since October 2, 1899, plaintiff has not ordered from the Berliner Gramophone Company any Gramophones, but has ordered large quantities of records, nor has the Berliner Gramophone Company sold or delivered to the National Gramophone Corporation, or to any other person or Corporation, any Gramophones, except such as were ordered by the said plaintiff on or prior to October 2nd, 1899. Since October 2nd, 1899, the said plaintiff has persistently demanded that the Berliner Gramophone Company shall sell and deliver to him under the contract of October 10th, 1896 (it to purchase the same for that purpose) a certain talking machine manufactured by the Universal Talking Machine Company, which machine is an infringement of the Gramophone, and against which Company suit by the defendant herein is now pending for said infringement. The purpose of plaintiff in making this demand was to sell through the medium of the National Gramophone Corporation infringing machines manufactured by the Universal Talking Machine Company. The certificate of organization of the Universal Talking Machine Company is hereto annexed marked Exhibit D. The plaintiff is a Director of the National Gramophone Corporation, has been its

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Treasurer, and has owned, if he does not own at present, a large if not controlling interest in its stock, and directs the business policy of the said Company. Defendant avers that plaintiff has fraudulently and maliciously conspired with said Company, and used said Company to enable him to evade the provisions of the contract of October 10th, 1896, relating to the purchase by him of Gramophones, while at the same time he sought to avail himself of the privilege of buying records from the Berliner Gramophone Company.

11. The defendant denies all of the averments contained in paragraph 15 of the Bill.

12. The defendant does not deny the number of records and the prices therefor averred in paragraph 16 of the Bill to have been delivered to plaintiff during the years 1897, 1898, 1899 and 1900. Defendant, however, avers that it has never declined or refused to furnish records to plaintiff, but that the later orders for records were held unfilled, until plaintiff should furnish to defendant a proper explanation of why he no longer ordered Gramophones, and why through his connection with the National Gramophone Corporation, and the Universal Talking Machine Company, he had ceased to promote the Gramophone business, thereby violating his agreement of October 10th, 1896.

13. It is true as averred in paragraph 17 of the bill that the defendant has in its possession great numbers of matrices, but the title to such matrices is in the defendant and not in the plaintiff. It is also true that defendant has in its possession various and numerous records, stamps, and such matrices, which it has always been ready and willing to deliver to the plaintiff, upon assurances from him that he would no longer continue to violate his agreement of October 10th, 1896. Defendant is advised and therefore avers that owing to the many and manifest breaches of the contract of October 10th, 1896, by the plaintiff it has at the present time the right to sell such records to any other persons to whom it may desire; but up to the present time, defendant avers that it has not sold any of such records, nor has it threatened to sell the same.

14. It is true, as set forth in paragraph 18 of the Bill, that plaintiff ordered from defendant large numbers of records, subsequent to the 18th day of April, and during the month of May, 1900, but defendant has deferred filling such orders for the reasons hereinbefore stated. Defendant has not sent any bills to the plaintiff, for talent or matrices, since May 1st, 1900. It is true that since the first of May defendant has used matrices, made prior to the first of May, but is advised and therefore avers that it has a right so to do.

15. The defendant does not deny as averred in paragraph 19 the number and value of the records ordered by plaintiff, but it does deny that it has ever refused to supply said orders.

16. The defendant denies, as averred in paragraph 20 of Bill, that it has refused to fill the orders of plaintiff therein referred to, but has delayed filling the same, for the reasons herein before stated. Defendant further avers that, practically, the only customer which the plaintiff has had, is the National Gramophone Company, and its successor, the National Gramophone Corporation. All of the orders referred to in paragraphs 18 and 19, with one exception contained a direction, that the records should be delivered to the National Gramophone Corporation. During all this time, the National Gramophone Corporation, whose business and policy the plaintiff directed, was engaged in the sale of a talking machine known as the Zonophone, which was an infringing machine on the Gramophone, and to prevent which infringement, the Berliner Gramophone Company had filed bills in Equity, against the National Gramophone Corporation, on May 26th, 1900. Defendant further avers that on May 18th, 1900, the National Gramophone Corporation announced, that the Gramophone had been withdrawn from sale and that thereafter the Zonophone alone, would be sold by them as appeared by advertisements of National Gramophone Corporation, annexed hereto and marked Exhibits E and J. A large number if not all of the announcements and advertisements of the National Gramophone Company and the National Gramophone Corporation, and Universal Talking Machine, including the announcement that the Gramophone had been withdrawn from sale, and that the Zonophone was to be sold in its place, were personally inserted by the plaintiff in various periodicals. On information and belief, defendant avers that plaintiff personally handed copy for such advertisements, to the advertising manager of *McClure's Magazine*, *The Chautauquan*, *Review of Reviews* and *Life*, and *Montreal Star*. Copies of letters addressed

by the plaintiff to the *Montreal Star* are hereto annexed, marked Exhibits F and G.

17. The defendant denies all of the averments contained in paragraph 21 of the Bill.

18. The defendant admits, as averred in paragraph 22 of the bill, that a great and large demand for thousands of such machines and records exists, but is without knowledge as to plaintiff's desire to supply such demands. Defendant denies all the remaining averments of said paragraph.

19. The defendant denies, as averred in paragraph 23 of the bill, that plaintiff's loss if he has sustained any, has been caused by any unjust and arbitrary refusal by defendant, to deliver goods under and pursuant to the contract of October 10th, 1896. Defendant is advised and therefore avers that if the plaintiff has any cause of action against the defendant, he has an adequate remedy at law, and that a court of Equity has no jurisdiction.

20. The defendant does not deny the averments, contained in paragraph 24 of the Bill, but is advised and therefore avers, that under the circumstances herein before fully set forth, it was entitled, in law, to delay the delivery of records ordered by the plaintiff since April 19th, 1900.

21. The defendant admits, as averred in paragraph 25 of the Bill, that plaintiff has demanded from defendant to furnish to him samples of new records, but defendant denies that it has refused to furnish such samples. Defendant is advised, and therefore avers, that under the circumstances herein before fully set forth, it was not required in law to furnish such samples.

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22. The defendant admits, as averred in paragraph 26 of the bill, that plaintiff has demanded from it a statement of the matrices made and on hand, and likewise of the records, but it denies that it has refused to furnish such state-

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ment. Defendant is advised, and therefore avers, that for the reasons herein before fully set forth, it was not in law obliged to furnish such statements.

23. The defendant denies, that plaintiff was entitled, under the circumstances hereinbefore and hereinafter fully set forth, to demand arbitration as to any matters of dispute, as to the construction of the contract of October, 1896.

24. And the defendant, further answering says, that under the contract of October 10, 1896, plaintiff covenanted to order and purchase from defendant gramophones and gramophone goods, to the minimum amount of Ten thousand dollars, at manufacturing cost, during each and every calendar month. Plaintiff also covenanted to "use his best efforts to promote the gramophone business in the United States," and to "advertise gramophones and gramophone goods, prominently and freely as 'Berliner' Gramophones and 'Berliner' Gramophone goods." Plaintiff also covenanted not to "manufacture buy sell or use gramophones or gramophone goods, or any parts thereof, or other talking machine or parts thereof, except such as he buys from the licensor." Plaintiff also covenanted not to "make use of any other name than that of Emile Berliner, in connection with gramophones and gramophone goods," and not to "detach or deface any patent marks or other marks or labels, placed by the licensor, upon its gramophones, gramophone goods and publications," and not to "add to them other marks or labels without the consent in writing of the licensor." Plaintiff also covenanted to exhibit at all times, his books of account to defendant when requested.

Defendant charges that plaintiff has broken the above covenants as follows:

(a.) He has not from October 2, 1899, to the date of the filing of this bill, ordered gramophones and gramo-

phone goods to the minimum value of Ten thousand dollars, at manufacturing cost, during each and every calendar month.

(b.) Plaintiff has not used his best efforts to promote the gramophone business, but on the contrary has constantly endeavored to injure said business, by combining with the National Gramophone Corporation, and the Universal Talking Machine Company, in placing upon the market and promoting the sale of the Zonophone, a machine which infringes the Gramophone. Instead of promoting the gramophone business, he has done all in his power to promote the sale of a machine, made and sold by a rival company.

(c.) Plaintiff has not advertised gramophone goods prominently and freely, as "'Berliner' gramophones and 'Berliner' gramophone goods." On the contrary, he has systematically suppressed the name "Berliner" in his advertisements, and in those of the National Gramophone Corporation which he controls, and in said advertisements he has also in many cases substituted the word "zonophone" or the word "vocophone" for the word "gramophone."

(d.) Plaintiff secretly and without the knowledge of the defendant, early in the year 1898 manufactured gramophone records. Defendant had no information of this breach of contract, on the part of plaintiff, until shortly before the filing of the bill in this action.

(e.) Plaintiff has caused marks and labels, placed by defendant upon its gramophone goods, to be detached and defaced. In the spring of 1898, plaintiff instructed C. G. Child, at that time an employee of the National Gramophone Corporation, that he should not be too particular about the patent stamp bearing the name E. Berliner Gramophone, with dates of patent, stating that he, plaintiff, did not care how much that was blurred or obliterated.

(f.) On December 8th, defendant formally demanded that the plaintiff exhibit his books of account in order to

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enable defendant to determine whether the plaintiff had complied with the contract of October 10th, 1896, relating to advertising. Plaintiff, however, refused to comply with defendant's request, and has never at any time exhibited to defendant the proper books of account, which would enable the defendant to ascertain the information, upon which the question in dispute had arisen.

(g.) Plaintiff through his control of the National Gramophone Corporation permitted a consent decree to be entered against it, in a suit in equity instituted by the American Graphophone Company against Frank Seaman and the National Gramophone Corporation, which suit was brought to restrain the sale of gramophones and alleged the infringement of the graphophone. The consent decree was entered on May 5, 1900. On May 10th., 12th., 18th., and June 27th, 1900, the notices or circulars marked "Exhibits H. I, J, and K" were all sent out from the National Gramophone Corporation's office.

25. Defendant further states that since April 1900 when the defendant came to a full knowledge of the acts and purposes of the plaintiff, it constantly appealed to him to explain his conduct and to comply with the terms of his contract. Full opportunity was given him to do so, and it was not until after the present bill was filed that defendant on July 24, 1900, cancelled the contract, and on July 26, 1900, notified the plaintiff thereof. The resolution of the Berliner Gramophone Company cancelling the contract and the notice to plaintiff thereof and affidavit of service are hereto annexed marked Exhibits L, M, and N.

26. Defendant is advised, and therefore avers, that owing to the bad faith, which the plaintiff has displayed toward the defendant, and his numerous breaches of the contract of October 10, 1896, plaintiff has no standing in a court of equity, to demand the relief prayed for in his bill.

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Wherefore defendant having answered prays that said bill be dismissed with costs.

BERLINER GRAMOPHONE COMPANY,

By

THOMAS S. PARVIN,

President.

[Corporate
Seal.]

Attest:

MAX H. BIERNBAUM,

Secretary.

ALBERT B. WEIMER,

FREDERICK M. LEONARD,

MARSHALL McCORMICK,

Solicitors for Defendant.

_____*42_____
STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

Thomas S. Parvin, being duly sworn, deposes and says, that he is the President of the Berliner Gramophone Company, defendant above named, and that the matters and things set forth in the foregoing answer, are true and correct, in so far as they are within his own knowledge, and in so far as they are not within his own knowledge, he believes them to be true.

THOMAS S. PARVIN.

Sworn and subscribed to before me this 4th day of August, A. D. 1900.

WILLIAM E. STOKES,

Notary Public.

[Notarial
Seal.]

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STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE, } ss.:

I have compared the preceding with the original Certificate of Incorporation of National Gramophone Corporation of New York filed and recorded in this office on the 10th day of March 1899, and do hereby certify the same to be a correct transcript therefrom and of the whole of said original.



Witness, my hand, and the Seal of Office of the Secretary of State, at the City of Albany, this seventeenth day of July one thousand nine hundred.

J. B. H. MONGIN,
Deputy Secretary of State.

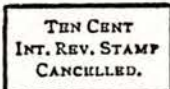


Exhibit D, with Answer.

CERTIFICATE OF INCORPORATION

OF

THE UNIVERSAL TALKING MACHINE
COMPANY.

We, the undersigned, desiring to form a corporation pursuant to the Business Corporation Law, all being of full age, citizens of the United States and residents of the State of New York, do hereby certify:—

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First.—The name of the proposed corporation is THE UNIVERSAL TALKING MACHINE COMPANY.

Second.—The purposes for which it is to be formed are:—To manufacture, buy, own and sell, coin actuating and other automatic devices, and also machines for reproducing musical and other sounds; to purchase and own

material, to be used in the manufacture, production and operation thereof; to own, hold and control inventions, discoveries and patents, United States and foreign, issued, and to be issued, for and upon such machines and upon processes and systems, for the manufacture and production thereof, or the accomplishment of the results produced thereby; to license other, to prosecute such business, and use said inventions and appliances, so far as may be consistent with the right which may be required by it; to introduce and exploit such inventions and manufactures; to own and control patents, inventions and discoveries, useful in such business; to manufacture, deal in, and sell articles which may be manufactured, and buy and sell articles which may profitably be bought and sold, in connection with said business; to purchase, own and sell machinery, and other property, necessary or convenient in the transaction of the business of this company, to own, control, sell and deal in stocks and bonds of corporations, using such machines, appliances and inventions; and to deal in or with them, or any of them, so far as this may be done, in accordance with the laws of the State of New York, and as shall be useful or advantageous, in conducting the business of the company; to buy or lease lands and buildings, for the conducting of such business, and mortgage, lease, or sell the same, if expedient; to raise means for the conducting of such business, by the issuing of bonds or other obligations and to mortgage for that purpose, the charter and franchise of this corporation; and in general to do and to perform any and all acts, and negotiate and carry out any and all the contracts and arrangements, which shall be deemed, by its directors or officers, necessary, convenient or advantageous therein or thereto.

Third.—The amount of the capital stock is \$20,000.

Fourth.—The number of shares of which the capital stock shall consist is Two Hundred (\$200). And the amount of the capital stock with which said corporation will begin business is One thousand dollars.

Fifth.—The location of its principal office is to be in the city of Yonkers, County of Westchester, State of New

York, and its business is also to be carried on in the City of New York, and other cities throughout the United States of America.

Sixth.—Its duration is to be fifty years.

Seventh.—The number of its directions is to be three.

Eighth.—The names and post-office addresses of the directors for the first year are as follows:—

NAMES.	POST OFFICE ADDRESSES.
Orlando J. Hackett,	10 Wall St., New York City, N. Y.
Edward A. Reser,	10 Wall St., New York City, N. Y.
William Moyse, Jr.,	160 Broadway, New York City, N. Y.

Ninth.—The names and post-office addresses of the subscribers, and the number of shares which each agrees to take in the consideration are as follows:

NAMES.	POST OFFICE ADDRESS.	NUMBER OF SHARES.
Orlando J. Hackett,	10 Wall St., New York, N. Y.	Eight.
Edward A. Reser,	10 Wall St., New York, N. Y.	One.
William Moyse, Jr.,	160 Broadway, New York, N. Y.	One.

In Witness Whereof, We have made, signed and acknowledged this certificate this 26th day of January, 1898.

ORLANDO J. HACKETT.
EDWARD A. RESER.
WILLIAM MOYSE, JR.

STATE OF NEW YORK.
CITY AND COUNTY OF NEW YORK. } ss.

On this 29 day of January, 1898, before me, the subscriber, personally came Orlando J. Hackett, Edward A. Reser and William Mayse, to me known and known to me to be the individual described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

[SEAL]

HARRY P. IVES,
Notary Public, New York Co., N. Y.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.

I, William Sohmer, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do hereby certify, That Harry F. Ives whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof, or acknowledgment, is genuine.



In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 3 day of Feby., 1898.

WM. SOHMER,
Clerk.

*Indorsed:—*Certificate of Incorporation of The Universal Talking Machine.

Tax for privilege of organization of this Corporation.
\$25.00
Under Chapter 928, Laws of 1896. Paid to State Treasurer before Filing.

STATE OF NEW YORK, }
OFFICE OF SECRETARY OF STATE, }

Filed and recorded Feb. 10, 1898.

ANDREW DAVIDSON,
Deputy Secretary of State.

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STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE, } ss.

I have compared the preceding with the original Certificate of Incorporation of The Universal Talking Machine Company filed and recorded in this office on the 10th day of February, 1898, and do hereby certify the same be a correct transcript therefrom and of the whole of said original.



Witness, my hand and the Seal of Office of the Secretary of State, at the City of Albany, this seventeenth day of July, one thousand nine hundred.

J. B. H. MONGIN,
Deputy Secretary of State.

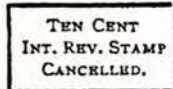


Exhibit E, with Answer.

[Taken out July 5th, 1900, number of *Life*.]

ZON-O-PHONE.

Improved GRAM-O-PHONE.

(Cut)

The new disc machine, combining the best features of our Gram-o-phone (which is now abandoned, including its name) and the joint patents of

NATIONAL GRAM-O-PHONE CORPORATION
UNIVERSAL TALKING MACHINE CO.
AMERICAN GRAPHOPHONE COMPANY
COLUMBIA PHONOGRAPH COMPANY

which companies have made an agreement between themselves for legal protection and commercial advantage. No disc machine other than the Zon-o-phone can be legally

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calls my attention to the fact that you are accepting advertisements from Mr. Blout, of Montreal, who advertises a competing machine, and in which advertisements he mentions the Zon-o-phone by name. This is unfair, and illegitimate advertising, and I ask that you see that no further advertising, which mentions this name, is accepted for insertion in the *Star*. I have no objection to any legitimate advertising on the merits of the machine advertised, but I do not think that one advertiser should be permitted to mention another advertiser in your paper by name. This is regarded as illegitimate in the States, and I presume that you will take the same broad, business-like view.

Yours Respectfully,

(Signed) FRANK SEAMAN.

Exhibit H, with Answer.

FRANK J. DUNHAM,
President.

ORVILLE D. LA DOW,
Secretary & Gen'l Manager.

FRANK SEAMAN,
Treasurer.

NATIONAL GRAM-O-PHONE CORPORATION,

874 BROADWAY,

[Cut]

Cor. 18th St.

NEW YORK, May 10th, 1900.

To the Trade:

We have it at last—a new model machine for 1900, conceived from a knowledge of the needs of the trade and born with a perfection scarcely anticipated by ourselves. We have kept you waiting a long time, for which we are sorry; we have spent thousand of dollars in perfecting this gem, for which we are glad. "The end crowns the work." We have now something to show, something artistic, something to talk about, something to please, no matter how dainty the taste, musically or mechanically. Every imperfection of the older types have been eliminated. It is new from its name, the Zon-o-phone, to its ingenious

winding gears and turn-table; it is much better than a Gram-o-phone in results, and infinitely better in conception, construction, design and workmanship. It is the handsomest talking machine on the market, of any make, and its work are on a par with its attractive appearance.

We have not overlooked anything, not even the legal side, for we have just closed arrangements with the American Graphophone Company, by which the broad and basic patents of the Zon-o-phone, are supplemented by all rights of the Graphophone patents, thus insuring our trade, for all time, freedom from any thought of litigation on account of infringement. The joint protection of all patents, so far as disc machines are concerned, is given exclusively to the machines manufactured or sold by this corporation, thus giving to our output a legal protection never yet approached by any talking machine on the market, the Zon-o-phone becomes the talking machine par excellence, in its own particular field.

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The Zon-o-phone can be furnished in three types: Type A, with bevelled plate glass sides, and brass horn, \$25; Type B, with quartered oak sides, and brass horn, \$22.50; Type C, including all Zon-o-phone improvements, furnished with heavy Japanned horn, \$18.00.

Immediate delivery can be made, and your continued favors are respectfully solicited.

Very respectfully,

NATIONAL GRAM-O-PHONE CORPORATION.

Illustrated catalogue and confidential list to dealers are enclosed.

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Exhibit I, with Answer.

Form No. 321-A.
New York. Philadelphia. Baltimore. Washington. Chicago. St. Louis. Buffalo.
San Francisco. Paris. Berlin.

DIRECTORS:

M. E. LYLE. ANDREW DEVINE. F. J. WARBURTON. EDWARD D. EASTON.
R. F. CROMELIN. THOS. K. WHITE, JR. PHILIP MAURO. WM. HERBERT SMITH
JOHN J. PHELPS.

EXECUTIVE OFFICES

AMERICAN GRAPHOPHONE COMPANY.

COLUMBIA PHONOGRAPH CO.,

Sole Sales Agent.

EDWARD D. EASTON, President. HERBERT A. BUDLONG, Executive Officer.
M. E. LYLE, Vice President. A. B. CROMELIN, Assistant Executive Officer
WM. HERBERT SMITH, Treasurer. F. BISCHOFF, Secretary.
[CUT]

Factory—Bridgeport, Conn.

135-137 BROADWAY,

NEW YORK CITY, May 12th, 1900.

To Dealers in Gram-o-phones:

Some months since we issued a circular announcing that the Gram-o-phone infringed the patents of the American Graphophone Company, and that litigation was in progress for an injunction, accounting and damages.

We have recently concluded an arrangement with the National Gram-o-phone Corporation and the Universal Talking Machine Company, whereby infringement is conceded, the Gram-o-phone is by them withdrawn from sale, and a superior disc talking machine, known as the Zon-o-phone is substituted and offered to the trade under the joint protection of the Graphophone, National Gram-o-phone and Universal Talking Machine Company's patents.

We believe the Zon-o-phone to be so superior to the Gram-o-phone that we shall offer it for sale with Graphophones in all of our establishments in the United States and in Europe.

Dealers can arrange with the National Gram-o-phone Corporation, for an exchange of any Gram-o-phones they may have on hand, and by securing Zon-o-phones will thus be free from liability to us.

All who make, sell or use the Gram-o-phone or other forms of unlicensed disc machines are liable to prosecution for infringement.

Yours truly,

E. D. EASTON

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Exhibit J, with Answer.

FRANK J. DUNHAM,
President.

ORVILLE D. LA DOW,
Secretary & Gen'l Manager.

FRANK SEAMAN,
Treasurer.

NATIONAL GRAM-O-PHONE CORPORATION.

874 BROADWAY,

[cut]

Cor. 18th St.

NEW YORK, May 18th, 1900.

DEAR SIR:—We make the following statement for the benefit of all concerned:

The National Gram-o-phone Corporation and the Universal Talking Machine Company have formed an alliance with the American Graphophone Company and the Columbia Phonograph Company, for the mutual advantage and protection of the disc talking machine trade.

On May 5th a decree was entered by Judge Lacombe, of the United States Circuit Court, decreeing the talking machine Gram-o-phone to be an infringement of the Graphophone patents. The Gram-o-phone is therefore abandoned, and the infringing features heretofore found by Judge Lacombe in his decision, granting a preliminary injunction, are by this joint agreement at the disposal of the National Gram-o-phone Corporation.

The various patents of the above alliance are now merged in a new disc-machine to be known as the Zon-o-phone, which becomes the 1900 model of the Gram-o-phone Corporation, and is now ready for the market.

The rights of the National Gram-o-phone Corporation therein are absolute and exclusive, and the rights of the trade to deal in the Zon-o-phone are conceded by all parties. The rights of the Zon-o-phone being exclusive, the alliance will operate jointly in defending and enforcing such rights against every other form of disc-machine.

Graphophone suits against dealers in Gram-o-phones will be withdrawn in cases where the sale of the infringing

machines is abandoned, and the Zon-o-phone substituted therefor.

The continued sale of the Gram-o-phone will entail prosecution.

Blanks for agreements to these conditions will be provided.

The National Gram-o-phone Corporation will make special arrangements for the exchange of Gram-o-phones for Zon-o-phones, and is authorized to make arrangements for the disposition of Gram-o-phones now on hand. For the Graph-o-phone Co., they recognize the Zon-o-phone—its superior merits as a machine and its undisputed legal *status*—by placing it on sale, in connection with Graphophones, at their principal stores throughout the world.

The Zon-o-phone will please you immensely. It's new, it's novel, it's handsome, it's artistic, it's something to talk about; it's free from patent litigation, its work is ten times better than a Gram-o-phone, it's the talking machine of the times.

The Zon-o-phone is made in three types: Type A, with bevelled plate glass sides, and brass horn, \$25; Type B, with quartered oak sides, and brass horn, \$22.50; Type C, including all Zon-o-phone improvements, furnished with heavy japanned horn, \$18.00.

In conclusion, we congratulate the trade on the final disposition of this question, and bespeak for the operations, of the alliance, abundant success and freedom from future

*52

annoyance on the subject of patent litigation.

Very respectfully,

NATIONAL GRAM-O-PHONE CORPORATION.

Secretary.

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FRANK J. DUNHAM,
President.

ORVILLE D. LA DOW,
Secretary & Gen'l Manager.

FRANK SEAMAN,
Treasurer.

NATIONAL GRAM-O-PHONE CORPORATION.

874 BROADWAY,

[cut]

Cor. 18th St.

NEW YORK,

To the Trade:—

In consideration of the conditions named in our agreement enclosed herewith and of the quotation recently made you on our Records, we respectfully request your signature to the original document and its prompt return.

This we ask believing that our mutual interests will be best conserved by this form of understanding between us.

Trusting to have your co-operation and early reply, we remain,

Very respectfully,

NATIONAL GRAM-O-PHONE CORPORATION.

This copy to be signed and returned to the National Gram-o-phone Corporation, 874 Broadway, New York.

[Original.]

In consideration of the terms of the circular letter of the American Gramophone Co., dated May 12th, and of the circular letter of the National Gram-o-phone Corporation, dated May 18th, granting the protection of the joint patents of the Corporations named, under the conditions specified in said letters, and in further consideration of the exchange of Gram-o-phones for Zon-ophones, made by the National Gram-o-phone Corporation, I (we) hereby agree to abstain from buying, handling or dealing in any form of talking machine using disc records, other than the Zon-o-phone.

Signature,

Date,

Street No.

Business,

City,

State,

164-70

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Exhibit K, with Answer.

PHILIP MAURO.

PHILIP MAURO

CABLE ADDRESS:

"Mauro-Washington."

S. T. CAMERON.

COUNSELLOR AT LAW,

(Lichers Standard Code.

REEVE LEWIS.

TELEPHONE:

C. A. L. MASSIE.

OFFICES: { 620 F STREET, WASHINGTON, D. C. Washington, 1394
137 BROADWAY, N. Y. New York, 1 Cortlandt.

NEW YORK, June 27th, 1900.

DEAR SIR:—The undersigned, counsel respectively for the American Graphophone Company, the Columbia Phonograph Company and the National Gram-o-phone Corporation, acting in their joint interests, beg to confirm the information which you have already received relative to the agreements recently entered into between the above named Companies. As an agent of the National Gram-o-phone Corporation you are protected in handling its product, by all the patents owned or controlled by all the Companies parties to said agreement. We are requested by our clients to convey to the agents and dealers of the National Gram-o-phone Corporation, the assurance that, in the sale of Zon-o-phones, records and supplies, they will receive the full legal protection afforded by said patents.

In the event of any attempt by unauthorized persons to place on the market disc machines such as have been held to be infringements of patents controlled by the above interests, we will be obliged to you for prompt and complete information thereof. Our instructions are, to enforce the above described patents, by appropriate legal proceedings against all infringing makers, dealers or users.

Respectfully,

PHILIP MAURO,

*Counsel for American Graphophone Company
and Columbia Phonograph Co.*

WALDO G. MORSE,

Counsel for National Gram-o-phone Corporation.

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Exhibit L, with Answer.

BERLINER GRAMOPHONE COMPANY.

I, the undersigned, Max H. Biernbaum, Secretary of the Berliner Gramophone Company, do hereby certify that, at an adjourned meeting of the Board of Directors of the said Company, duly called and held on the 29th. day of June, A. D. 1900, the following resolutions were unanimously adopted, viz.:

"Resolved, That Frank Seaman has committed numerous wilful, gross and flagrant breaches of his covenants contained in the agreement, dated October 10, 1896, between this company and the said Frank Seaman;

"Resolved, Therefore, That this company is absolved and does hereby declare itself absolved from any and all obligations to the said Frank Seaman on account of the said contract, and does further declare all the rights of the said Frank Seaman under the said contract absolutely ended;

"And Resolved, That the President of this Company be, and he is hereby, authorized to notify the said Frank Seaman of this Company's decision as set forth in the foregoing resolutions, and to take, on behalf of this company, any and all action which he deems expedient, whether by suit at law or in equity, or by other means, to protect the rights of this company in the premises, and to compel the said Frank Seaman to make full and adequate compensation for the loss and damage suffered by this Company as the result of the said Frank Seaman's acts and defaults."

Witness my hand and the corporate seal of the said Company, this twenty-fourth day of July, A. D. 1900.

(Signed) MAX H. BIERNBAUM,
[SEAL] Secretary.

Exhibit M, with Answer.

BERLINER GRAMOPHONE COMPANY
424 South 10th St., Philadelphia.

Cable Address
"Gramophone,"
Subject.

JULY 24, 1900.

Frank Seaman, Esq., 874 Broadway, New York City.

DEAR SIR:—I regret to inform you that you have compelled the Berliner Gramophone Company to declare itself absolved from any and all obligations to you on account of the agreement, dated October 10, 1896, between the Company and yourself, and further to declare all your rights under the said contract absolutely ended. I enclose herewith a certified copy of three resolutions adopted the 29th. ult., to that effect.

You are perfectly acquainted with the course that you have pursued and with my repeated warnings to you of the inevitable result. I cannot suppose, therefore, that the announcement which I make to you is in the least unexpected. Upon ample evidence in its possession, the Berliner Gramophone Company is advised, for the acts which you have committed, it is entitled to hold you personally and strictly responsible, both in heavy damages and otherwise. You are well acquainted with the forbearance and courtesy with which you have uniformly been treated, and your experience as a business man, ought to suggest to you, that such treatment usually comes from people of sincere and determined disposition, I need not therefore go into any further explanation. I only say to you with my usual directness that, unless you withdraw forthwith your suit in Virginia, and give me satisfactory acknowledgments and assurances in writing, you will force me to take against you personally such measures as will possibly exceed in severity anything that you have anticipated.

Very truly yours,
(Signed) THOS. S. PARVIN,
President.

Exhibit N, with Answer.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } ss:

David L. Raine being duly sworn says that he resides in the city of New York, and is above the age of twenty-one years; that on the 26th. day of July, 1900, he served the annexed letter from the Berliner Gramophone Co. to Frank Seaman dated July 24th. 1900, and the annexed resolution of the board of directors of said Gramophone Company, upon said Frank Seaman at No. 874 Broadway, in the city of New York (Borough of Manhattan) by delivering the original copies of said letter to and by leaving the same with said Frank Seaman personally. Deponent further says that he knew the person upon whom he so served the said letter and resolution to be the Frank Seaman named therein.

DAVID L. RAINE.

Sworn to before me this 26th. day of July, 1900.

CHARLES W. MILLARD,
Notary Public, New York Co.

Cert. filed in Kings Co.

*54

And at another day, to wit, at an adjourned Term of said Court, held on the 17th day of August, A. D. 1900, came again the parties, by counsel, and the following order was entered, viz.

Frank Seaman, Plaintiff.

versus.

The Berliner Gramophone Company, Defendant.

This day came the Defendant, The Berliner Gramophone Company, by Counsel, and the Plaintiff Frank Sea-

man, by Counsel, and thereupon, the defendant moved the Court, to dissolve the injunction awarded in this cause, on the 25th day of June, 1900, whereupon, the Plaintiff objected to the hearing of the said motion, on the ground of insufficient notice, the absence of Waldo G. Morse, senior Counsel for the plaintiff, and the further ground, that the answer of the defendant, having been filed on the 6th day of August, 1900, the rules to which process were returnable, that the plaintiff was thereupon entitled to the next succeeding rule day, to file exceptions to said answer, and upon the further ground, that the plaintiff had not received copies, and was not aware of the contents of the affidavits proposed to be submitted by the defendant upon the hearing of said motion; and the plaintiff thereupon moved the Court to continue the hearing of said motion to dissolve said injunction. Upon consideration whereof and argument of Counsel, for reasons satisfactory to the Court, it is this 17th day of August, 1900, accordingly ordered, adjudged and decreed, that said motion of the Defendant, be docketed and the hearing of said motion be, and the same is hereby continued.

*55

And at another day, to wit, in the office of the Clerk of said Court on the 6th day of September, A. D. 1900 came the Defendant again by Counsel and filed certain affidavits and exhibits therewith, which are in words and figures, following, to wit:

**JOINT AFFIDAVIT OF THOMAS S. PARVIN
AND MAX H. BIERNBAUM.**

CITY AND COUNTY OF PHILADELPHIA, } ss.
STATE OF PENNSYLVANIA,

Thomas S. Parvin and Max H. Biernbaum being duly sworn depose and say that they respectively are the President and Secretary of the Berliner Gramophone Company, and are intimately acquainted with all the details of the

And on the same day the following order was entered, viz.:—

Decree Filing Bill and Granting Injunction.

<i>Frank Seaman, Plaintiff,</i>	}	IN EQUITY.
vs.		
<i>Berliner Gramophone Company, Defendant.</i>		

Upon motion of the plaintiff, Frank Seaman, by Waldo G. Morse and Geo. E. Sipe, his counsel, and upon the reading of the plaintiff's bill, this day filed in this cause, properly verified, and the affidavits of Frank Seaman, Frances Crouch, John T. Judge, and Geo. R. Burt, filed therewith, verified on the 22d of June, 1900, this court doth order that an injunction be and the same is hereby awarded to restrain the defendant, the Berliner Gramophone Company, its servants, employes, and agents, until the further order of this court, from selling, delivering, or otherwise disposing of, and likewise, from permitting or allowing any such selling, delivering or disposing of, within the United States of America, any of the gramophones, records, matrices or goods, manufactured by or for the said defendant company, and referred to in a certain contract made by it, with the plaintiff, and dated the tenth day of November, 1896, and exemplified with the plaintiff's bill, and, also, from likewise disposing of or allowing the disposition of, any other goods wherein the plaintiff has any interest, to any other person or persons than the said plaintiff, or those designated by him, save in so far as the defendant is entitled reasonably to sell, deliver, or dispose of the same, to its officers, directors, and stockholders, not for sale, gain, or profit, and except in the District of Columbia, for use therein, as provided by said contract, and except, also, any deliveries they may now be entitled to make, under certain contracts with Tate, Jones & Nellis, mentioned in the bill, should any such right of delivery exist.

But said injunction shall not take effect until the plaintiff, or some one for him, shall execute and file in this cause a bond with security to be approved by this court, in the penalty of five thousand dollars, conditioned to satisfy and discharge any costs and damages that may be incurred by the defendant by reason of the suing out of said injunction in case the same shall be dissolved.

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And on the same day Subpœna against the Defendant was issued, as follows, to wit:

Chancery Subpœna.

Issued 25 June, 1900.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF VIRGINIA, } ss.

The President of the United States of America to The Berliner Gramophone Company, a corporation organized under and by virtue of the Laws of the State of Virginia, and a resident of said State, having its principal place of business at the City of Roanoke, in said State, Greeting:

We command you, and every one of you, that you appear before our Judges of our Circuit Court of the United States of America, for the Western District of Virginia, at the Clerk's Office, in Harrisonburg, in said District, on the first Monday in the month of August next, to answer the bill of complaint of Frank Seaman, a citizen and resident of the State of New York, this day filed in the Clerk's Office of said Court in Chancery, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Virginia, to execute:

Witness, The Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Har-

risonburg, this 25th day of June, in the year of our Lord one thousand nine hundred and of our Independence the 124th year.

[OFFICIAL SEAL] A. K. FLETCHER,
Clerk.

MEMORANDUM.

The above named defendant is notified that, unless it enter its appearance in the Clerk's office of said Court, at Harrisonburg, aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against it as confessed and a decree entered according.

[OFFICIAL SEAL] A. K. FLETCHER,
Clerk.

See over for Injunction Mems.

Indorsements:—Mem.: The defendant, the Berliner Gramophone Company, its servants, employes and agents, until the further order of this Court, are restrained from selling, delivering or otherwise disposing of, and likewise from permitting or allowing any such selling, delivering or disposing of, within the United States of America, any of the gramophones, records, matrices, all goods manufactured by or for the said defendant Company, and referred to in a certain contract made by it with the plaintiff, and dated on the 10th day of November, 1896, and exemplified with the plaintiff's bill; and also from likewise disposing of or allowing the disposition of any other goods wherein the plaintiff has any interest, to any other person or persons than the said plaintiff, or those designated by him; save in so far as the defendant is entitled reasonably to sell, deliver or dispose of the same, to its officers, directors and stockholders, not for sale, gain or profit, and except in the District of Columbia, for use therein as provided by said contract, and except also, any deliveries they may now be entitled to make under certain

same is hereby overruled, to which action of the Court the defendant objected, it appearing to the Court the Complainant's Counsel denies the statement of facts herein, on motion of the Complainant leave is given him to file counter affidavits within 30 days from this date to be filed in this record as a part thereof when made.

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IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF VA.

Frank Seaman, Plaintiff,

vs.

The Berliner Gramophone Co.

This day the 1st of Novemer 1900 came the parties plaintiff and defendant where upon the motion of the defendant made Aug. 17 1900 to dissolve the injunction awarded in this cause on the 25th of June 1900 having been fully considered upon the record of this cause and argument of Counsel, it is ordered adjudged and decreed that the said motion to dissolve said injunction be and the same is hereby denied and that said injunction be continued the final hearing of this cause.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF VIRGINIA.

Frank Seaman

vs.

Berliner Gramophone Company.

The above named defendant deceming itself aggrieved by the decree made and entered in the above entitled cause on

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*Affidavit of Marshall McCormick.*IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE DISTRICT OF NEW JERSEY.

In Equity.

FRANK SEAMAN, UNITED STATES
GRAMOPHONE COMPANY and
BERLINER GRAMOPHONE COM-
PANY.

Complainants.

v.

VICTOR TALKING MACHINE COM-
PANY,

Defendant.

869

*Sur Motion for Preliminary Injunction.*Affidavit of Marshall McCormick, on behalf of de-
fendant.State of Virginia, }
County of Clarke. } ss.:

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Marshall McCormick, being first duly sworn, de-
poses and says as follows:1. I am forty-three years of age, a resident of Berry-
ville, Clarke County, Virginia, and have been actively
engaged in the practice of law in the State and Federal
Courts of Virginia for over thirty years.2. I have been, and am still, one of the counsel and
solicitors of the Berliner Gramophone Company, in all
of its litigation arising and pending in the Federal

Courts, Circuit and Appellate, in the State of Virginia, 871
in suits brought against it by Frank Seaman, the complainant in the above entitled suit; and I have taken an active part in the preparation of the various pleadings and in the arguments, both oral and printed, in the said litigation.

I am therefore familiar with all of the details of the entire litigation, beginning with the original suit, filed on June 25, 1900, in the Circuit Court of the United States for the Western District of Virginia.

3. I am and have been since the institution of the suit, the associate counsel of Mr. I. W. Nordinger, for the United States Gramophone Company, one of the above named complainants in the suit brought by Frank Seaman against it in the Circuit Court of the 872
United States for the District of West Virginia, in October, 1900.

4. I have read the bill of complaint and the motion papers filed by the complainants in the above entitled cause against the Victor Talking Machine Company, and have familiarized myself with the contents thereof.

5. The original bill of Frank Seaman v. The Berliner Gramophone Company, was filed in the Circuit Court of the United States for the Western District of Virginia, on or about June 25, 1900, and an injunction was awarded thereon on that day by the Hon. John Paul, now deceased, the then Judge of said Court, and the order of injunction will be found on 873
page 85 of the Transcript of Record No. 403, of the United States Circuit Court of Appeals, Fourth Circuit, styled the "Berliner Gramophone Company, Appellant, v. Frank Seaman, Appellee." One or more motions were made to dissolve the said injunction, and on November 1, 1900, an order was entered by the said Circuit Court of the United States for the Western District of Virginia, refusing to dissolve said injunction and continuing the same. (Page 543 of said record).

874 From this order an appeal was prayed for and allowed (see pages 543, 544 and 545). The case, on the appeal, was argued and submitted in May, 1901, and on July 6, 1901, the appeal was decided and the decree of November 1, 1900, was reserved and annulled. The concluding paragraph of the decree of the Circuit Court of Appeals for the Fourth Circuit, is as follows:

"It is now here ordered and adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and this cause is remanded to the said Circuit Court of the United States for the Western District of Virginia, at Harrisonburg, with directions to dismiss the bill without prejudice."

875 On the same day the mandate of the said Circuit Court of Appeals, signed by Henry T. Maloney, Clerk of the said Court, and addressed to the Judges of the Circuit Court of the United States for the Western District of Virginia, was sent down to the lower court.

On September 3, 1901, the said Circuit Court of the United States for the Western District of Virginia, entered the following order on said mandate:

"The mandate and judgment of the Honorable, the Circuit Court of Appeals, in this case having been transmitted by the Clerk of this Court to this Court,

876 It is ordered, adjudged and decreed that the judgment of the Circuit Court of Appeals be, and the same is hereby declared to be, the judgment of this Court. It is further ordered and decreed, pursuing the terms of said mandate, that the bill in this cause be dismissed for want of jurisdiction and without prejudice. The bill being thus dismissed for want of jurisdiction, no order is made with respect to the costs of the cause in this court.

(See *Citizen's Bank v. Cannon*, 164 U. S., 329.)

CHARLES H. SIMONTON,

3 Sept., 1901.

Circuit Judge."

The bill originally filed on June 25, 1890, was thereupon dismissed and the injunction awarded on June 25, 1900, was thereupon dissolved. 877

6. On or about December 7, 1900, the said Frank Seaman filed, without leave of court, an amended supplemental bill (see page 7 of the Transcript of the Record of the United States Circuit Court of Appeals, Fourth Circuit, No. 412, *Berliner Gramophone Company, Appellants, v. Frank Seaman, Appellee*).

It will be observed that this amended and supplemental bill was filed prior to the opinion of the Circuit Court of Appeals on the appeals from the order of Nov. 1, 1900. At the January Rules, 1901, the defendant filed its demurrer to the said amended supplemental bill, and on January 8, 1901, it filed its answer thereto. (See pages 16, 17, 18, 19, etc., of the said Transcript of Record, No. 412.) 878

On March 23, 1901, the Circuit Court of the United States for the Western District of Virginia, entered an order, based on said amended supplemental bill, the exhibits therewith filed, and on the demurrer, answer and exhibits of the defendants thereto. This order is simply awarded an injunction restraining the defendant company, until the further order of the court, from the further prosecution of a suit which had been instituted by the said company against Frank Seaman in the Circuit Court of the United States for the Southern District of New York, on the law side thereof for the recovery of damages, for a breach of the contract of Oct. 10, 1896. From this order or decree an appeal was taken to the Circuit Court of Appeals for the Fourth Circuit, and the record of that appeal is No. 412. The Circuit Court of Appeals affirmed the decree of March 23, 1901. My opinion is that this only meant a stay of that proceeding in New York until there could be a determination under the original bill, on the merits of the case. It will be seen that the Circuit Court of Appeals in affirming the decision of 879

880 the Lower Court, must have treated the case as of March 23, 1901, at which time there had been no decision of the Circuit Court of Appeals on the Appeal then pending, and therefore the single question before the Circuit Court of Appeals was whether or not as of that day—namely, March 23, 1901—of the Circuit Court of the United States for the Western District of Virginia should have entered such an order, the appeal having been instituted and the original injunction still in force as of that date.

881 It will be seen, therefore as a matter of fact shown by the record that on September 28, 1901, the only injunction in the Virginia Litigation was that of March 23, 1901, which restrained the further prosecution of the suit for damages in the Circuit Court of the United States for the Southern District of New York by the Berliner Gramophone Company against Frank Seaman. There was, as a matter of fact, no other injunction then in existence.

882 7. On October 29, 1901, Frank Seaman, the complainant in the above entitled suit, by his counsel, gave notice that a motion would be made before the Hon. Charles H. Simonton, one of the Judges of the Circuit Court of the United States for the Fourth Circuit, at Richmond, Va., for leave to file a petition asking further leave to file an amended and supplemental bill, a copy of which petition as well as a copy of the proposed amended and supplemental bill was attached to the notice. The application was not heard at or on the day fixed in the notice, but heard in December, 1901, before the Hon. Henry C. McDowell, who had in the interim been appointed to succeed the Hon. John Paul, late Judge of the District Court of the United States for the Western District of Virginia. Leave was given the plaintiff to file his amended and supplemental bill, and in the tenth paragraph thereof this language will be found.

"10. That your orator desires to withdraw, and hereby does withdraw, from his said amended and sup-

plemental bill of complaint all and all reference to the 883
 allegations, matters and things set forth therein, as
 contained in, and by way of reference to said original
 bill, and all prayers for injunction, mandatory or other-
 wise, in said original bill contained, and in lieu thereof
 to allege, plead and pray, as a part of this his bill
 amendatory of and supplementary thereto, as follows."

On April 30, 1902, Judge McDowell, acting on the
 prayer for an injunction, entered an order awarding
 the injunction as prayed for in the bill. The bond re-
 quired by this injunction order was not executed until
 sometime in June or July, 1902, the exact date not now
 remembered. At the September Rules, 1902, the Ber-
 liner Gramophone Company filed its answer to this
 second amended and supplemental bill, and on the 24th 884
 day of October, 1902, the complainant, Frank Seaman,
 deposited in the Clerk's office of the Circuit Court of
 the United States for the Western District of Virginia
 his replication to this answer, but it was not formally
 filed until the November Rules, 1902. Under this
 seconded amended and supplemental bill notice was
 served by the plaintiff, returnable Dec. 23, 1902, that
 an application would be made that day to the Hon.
 Henry C. McDowell, Judge of the District Court, and
 as such of the Circuit Court of the United States for
 the Western District of Virginia, to enter an order ap-
 pointing a special examiner to take the evidence on the
 part of the plaintiff. The counsel for the defendant
 had prepared prior to this time and sent to the said
 Judge an order requiring the plaintiff, the parties being 885
 at issue, to take his evidence by depositions in support
 of the allegations of his bill within a time to be limited
 by the Judge and giving to the defendant the right,
 after the completion of the plaintiff's depositions in
 chief, to take its evidence in support of the allegations
 of its answer, and in rebuttal of the plaintiff's evidence,
 and giving to the plaintiff, after the completion of the
 defendant's evidence, a limited time within which to
 take his evidence in rebuttal of such new evidence as
 might be introduced by the defendant in its depositions.

886 Up to this point of time no action has been taken by the court either upon the order presented by the plaintiff for the appointment of a Special Examiner, or upon the order submitted by the defendant's counsel requiring the taking of depositions by both parties within a limited time. The answer to the defendant company denied all the material allegations of the plaintiff's second amended and supplemental bill, and in addition thereto it alleged affirmatively various and sundry breaches of the contract upon the part of the complainant, Frank Seaman.

887 8. The injunctive order of April 30, 1902, awarded on the second amended and supplemental bill and referred to in bill of complaint, in the case at bar, was in no sense an order adjudicating any rights of Frank Seaman under the contract of October 10, 1896, but was merely an order, in the nature of an *ex parte* injunction to preserve the *status quo* of the parties pending the final hearing of the case on its merits. The answer of the defendant company had not been filed at the time this order was granted, and its appearance was by counsel simply for the purpose of objecting to the granting of the *ex parte* injunction, which was based upon the allegations of the second amended and supplemental bill, and the record of the entire case as it then stood.

888 9. The decree of September 24, 1900, page 503 of the record No. 403, was nothing but a rule upon the defendant company to show cause why the injunction of June 25, 1900, should not be enlarged, so as to enjoin and restrain the defendant company from giving away or offering to give away, except in the District of Columbia, any of the goods or articles or parts thereof contracted to the plaintiff under the contract of October 10, 1896, other than was provided for in said contract.

On September 29, 1900, page 501 of record No. 403, the defendant company filed its answer to this rule

and the further consideration of the matter was postponed to and set down to be heard on the 10th day of October, 1900, at Abingdon, Va., that being one of the places of session of the said District Court of the United States for the Western District of Virginia. This rule was subsequently discharged and the application of the complainant for an enlargement of his injunction of June 25, 1900, was denied.

889

10. The order of March 29, 1902, referred to in the bill of complaint in the case at bar was simply an order holding the Berliner Gramophone to be in contempt, because it had continued the prosecution of its suit instituted in the Southern District of New York against Frank Seaman for damages. The Berliner Gramophone Company had in good faith proceeded with the conduct of this suit for damages under the advice of counsel, and in the full belief that the decision of the United States Circuit Court of Appeals, for the Fourth Circuit, of July 6, 1901, whereby the original bill and the injunction awarded thereon of date June 25, 1900, had been dismissed and dissolved, operated to dismiss the amended and supplemental bill, which formed part of and was read into the original bill.

890

11. The decrees of October 4, 1900, and May 15, 1901, were decrees entered in this suit brought by Frank Seaman v. The United States Gramophone Company in the Circuit Court of the United States for the District of West Virginia, and the Honorable Judge of that Court held, that the West Virginia proceeding was ancillary to and based upon the litigation pending in Virginia. This proceeding is still pending in the Circuit Court of the United States for the Northern District of West Virginia, and because it has been held to be a proceeding ancillary to the litigation in Virginia no step has been taken to speed the cause.

891

12. It is clear, therefore, from this narrative of facts as they appear in the records referred to, that the only injunction existing *at this time* against the Ber-

1. new Company is The ex parte injunction of April 30,
1902, which order does not adjudicate any of the rights of the complainant or defendant, but was designed merely to preserve the *status quo* until a final hearing could be had upon the merits of the case, when the rights of all parties could be fairly and properly determined.

893 This statement is based upon the fact that the second amended and supplemental bill (Paragraph 10) withdraws in substance and effect the first amended and supplemental bill, filed December 7, 1900, and hereinbefore referred to. If the amended bill itself was withdrawn this deponent assumed that the injunctive order of March 23, 1901, must have been withdrawn and abandoned along with the abandonment of the bill itself.

894 13. On September 28, 1901, the only injunction then pending against the Berliner Gramophone Company in the Virginia litigation was that of March 23, 1901, which as before stated only enjoined the Berliner Gramophone Company from the further prosecution of its suit for damages against Frank Seaman, in the Southern District of New York. With the exception of this last named injunction, no other existed as of Sept. 28, 1901, against the Berliner Gramophone Company, because the order of April 30, 1902 had not then been entered nor had the second amended supplemental bill, on which said order was based, been filed, and because the injunction of June 25, 1900, had been dissolved and the bill on which it was granted had been dismissed, as hereinbefore stated by the mandate of Circuit Court of Appeals of the United States for the Fourth Circuit, and by the order entered by Judge Simonton of Sept. 3, 1901.

There has never been an order entered in any one of the suits pending in Virginia based upon the merits of the case. On the contrary every order, which up to this point of time have been entered has been based

upon the pleadings, supported by *ex parte* affidavits and
some documentary testimony. There has therefore
been no adjudication of the rights of either the com-
plainant or the defendant, but a reference to the an-
swer of the defendant to the second amended and sup-
plemental bill, hereinbefore referred to, will show that
every claim of Frank Seaman, the complainant in this
suit, to the exercise of any rights under the contract
of October 10, 1896, as distinctly denied and vigorous-
ly contested. As before stated the taking of proofs
by formal depositions, either under the order for the
appointment of an Examiner, if entered, or under
the order proposed by the defendant company, limit-
ing the time within which the deposition shall be taken
and completed, if adopted by the court, will doubtless
be commenced within a short time and I believe that
the case can be made ready for a hearing on the merits
within the next ninety days.

14. I am familiar with all the details of the Vir-
ginia litigation between Frank Seaman and the Ber-
liner Gramophone Company, and I have spent much
time and labor in the examination of the record and
in the study of the contract of October 10, 1896; and
I have examined a number of authorities—all that
have been accessible to me—bearing upon the question
involved in the controversy; and, after a most care-
ful study and consideration of the facts and the law,
as far as I have been able to examine the latter, I do
not believe that the complainant, Frank Seaman, can
maintain his suit in the Virginia courts for the specific
execution of the contract of October 10, 1896, but on
the contrary my decided belief is that the Berliner
Gramophone Company, because of the numerous
breaches by said Seaman, of the contract of October
10, 1896, was as a matter of law warranted and jus-
tified in the abrogation or rescission of said contract
of October 10, 1896, under which I think all of Sea-
man's rights have ended. There is nothing in the

898 record, so far as this deponent has been able to see, that shows any violation by the Berliner Gramophone Company of the contract of October 10, 1896, but upon the contrary the evidence abundantly shows, not only a purpose upon its part to fulfil every obligation of that contract, but an effort to *persuade* Frank Seaman to comply with the terms of the contract on his part and thus avoid the necessity on the part of the Berliner Gramophone Company of the rescission of the contract.

I refer, in support of this, to the affidavit of Mr. Thos. S. Parvin, page 136 of Transcript of Record No. 403, and the exhibits filed therewith.

899 15. I call special attention to the decision of Judge Coxé overruling the defendant's demurrer in the case of the Berliner Gramophone Company v. Frank Seaman, 11 Fed. Rep., page 679 (U. S. Circuit, So. Dist. of N. Y., Nov. 25, 1901) which is an action at law hereinbefore referred to and brought by the Berliner Gramophone Co. v. Seaman, claiming \$300,000 damages for the breach of the contract of October 10, 1896.

900 16. I omitted to mention the fact that after the opinion and mandate of July 6, 1901, of the Circuit Court of Appeals of the United States, Fourth Circuit, the complainant, Frank Seaman, filed in the Clerk's office of the Supreme Court of the United States, on July 10, 1901, a petition in which he prayed for a writ of *certiorari* to the Circuit Court of Appeals, of the United States, for the Fourth Circuit, which said petition is still pending in said court, and no action or notice of action has been had or given thereunder.

I desire to produce and file with this affidavit, printed copies of the records in the Virginia and West Virginia litigation, hereinbefore referred to; which copies I believe to be correct copies and they are marked respectively A, B, C, D, and E. Exhibit A

is a transcript of the record hereinbefore referred to 901
 as No. 403; Exhibit B is a transcript of the record
 hereinbefore referred to as No. 412; Exhibit C is a
 transcript of the record of the United States Gramo-
 phone Co. v. Frank Seaman; Exhibit D is a printed
 copy or transcript of the record showing copies of such
 papers as have been filed in the Virginia litigation sub-
 sequent to May 16, 1901, and Exhibit E is intended
 to embrace the opinion of July 16, 1901, the mandate
 of the Circuit Court of Appeals and the order of the
 Circuit Court of the United States for the Western
 District of Virginia, dated Sept. 3, 1901, and all of
 which have been hereinbefore referred to.

I desire to say in concluding this narrative that I
 have no sort of connection with the Victor Talking 902
 Machine Company, either professionally or otherwise,
 and that I have no kind of interest in the result of this
 suit. I have made this affidavit because of my fami-
 liarity with the record as a matter of convenience to
 the counsel who have requested me to put the matter
 in some methodical and systematic shape.

MARSHALL McCORMICK.

Sworn to and subscribed before me
 this 31st day of December, 1902.

Eugene Glover,
 Notary Public.

(Seal.)

I certify that under the laws of
 Virginia no tax is required 903
 upon the seal affixed to this in-
 strument.

Teste.

Eugene Glover,
 Notary Public.

904

*Decree of 3 September, 1901.*IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN,			} In Equity.
		Plaintiff,	
vs.			
BERLINER	GRAMOPHONE	COM-	
	PANY,		} Defendant.

905

The mandate and judgment of the honorable the Circuit Court of Appeals in this case having been transmitted by the clerk of that court to this court.

It is ordered, adjudged and decreed that the judgment of the Circuit Court of Appeals be, and the same is hereby declared to be, the judgment of this Court. It is further ordered and decreed, pursuing the terms of said mandate, that the bill in this case be dismissed for want of jurisdiction and without prejudice. The bill being thus dismissed for want of jurisdiction, no order is made with respect to the costs of the case in this court. (See *Citizens Bank v. Cannon*, 164 U. S., 322.)

906

CHARLES H. SIMONTON,
Circuit Judge.

3 Sept., 1901.

Filed 4 Sept., 1901.

Decree of 13 November, 1901.

907

IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN,			} In Equity.
Plaintiff.			
VS			
BERLINER	GRAMOPHONE	COM-	
	PANY,	Defendant.	

908

The plaintiff having given the defendant notice that he would on this the 12th day of November move the Honorable Charles H. Simonton, Circuit Judge for leave to file his petition for leave to file his amended supplemental bill in this cause, and it appearing that due notice has been given the defendant the Berliner Gramophone Company on this day came the parties plaintiff and defendant and thereupon it is ordered that said motion be docketed and set down for hearing at Harrisonburg Virginia where this suit is pending after ten days notice of the time of said hearing shall have been given the defendant.

CHARLES H. SIMONTON.

Circuit Judge.

909

13 Nov., 1901.

Filed Nov. 14, 1901.

IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN,			} Plaintiff,	} In Equity.
vs.				
BERLINER	GRAMOPHONE	COM-	} Defendant.	
	PANY,			

911

The plaintiff having heretofore given the defendant notice that he would on this the 9th of Dec., 1901 move the court for leave to file the petition to file the amended and supplemental bill in this cause this day came the plaintiff and on motion the said motion is docketed, and the hearing thereof continued until tomorrow at 10 o'clock A. M. counsel for defendant not appearing today.

HENRY C. McDOWELL,
District Judge.

Dec. 9, 1901.
Filed same day.

912

IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN, Plaintiff.	}	In Equity.
vs.		
BERLINER GRAMOPHONE COM- PANY, Defendant.		

914

This day came the plaintiff and moved the court for a rule against the defendant requiring it to show cause why it should not be proceeded against as in contempt of the injunction order entered herein on March 23, 1901 and the defendant not appearing on motion of the complainant it is ordered that said motion be docketed and the hearing thereof continued until tomorrow Dec. 10, 1901 at 10 o'clock A. M.

HENRY C. McDOWELL,
District Judge.

Dec. 9, 1901.

Filed and entered Dec. 9, 1901.

A. K. F.

Clk.

915

Decree of 10 December, 1901.

IN THE CIRCUIT COURT OF THE UNITED
STATES,

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN,	} In Equity.
Plaintiff.	
VS	
BERLINER GRAMOPHONE COM- PANY,	
Defendant.	

917

On this the 10th day of December, 1901, came the plaintiff, Frank Seaman, by counsel, and renewed his motion for a rule against the defendant to show cause why it should not be proceeded against as in contempt of the injunction order entered in this cause on March 23rd, 1901, and submitted on said motion, the affidavit of Waldo G. Morse, with exhibits accompanying the same.

Upon consideration whereof, it is ordered, adjudged and decreed that a rule do issue against the defendant the Berliner Gramophone Company, returnable before the Judge of this court, Hon. Henry C. McDowell, sitting in chambers at Bristol, Virginia, on Thursday, December 19th, 1901, at 12 o'clock, M.

918

And it is further ordered, that a copy of this order be mailed by the clerk of this court to Marshall McCormick, Esq., Berryville, Va., to F. M. Leonard, Esq., Forrest Building, Philadelphia, Penna., and a copy of this order together with a copy of the affidavit of W. G. Morse, served upon Judge Wm. G. Robertson, statutory attorney of the defendant.

And it is further ordered that at said hearing, on the return day of this rule, argument will be heard from such counsel, either for the plaintiff or for the defendant, as may appear.

327
And it is further ordered, that service of the copy of this order upon said statutory attorney, shall be equivalent to service of the rule and in lieu thereof. 919

HENRY C. McDOWELL.
District Judge.

Endorsed: Filed and entered 12/10, 01.

Decree of 10 December, 1901.

IN THE CIRCUIT COURT OF THE UNITED
STATES;

FOR THE WESTERN DISTRICT OF VIRGINIA. 920

FRANK SEAMAN,	} In Equity.
Plaintiff,	
vs	
BERLINER GRAMOPHONE COM-	} Defendant.
PANY,	

On this tenth day of December, 1901, came the complainant, Frank Seaman, by counsel, and tendered the Court his amended and supplemental bill bearing *teste* October twenty-first, 1901, and moved the court for leave to file the same in the above entitled cause. 921

Upon consideration whereof, it is ordered that said motion be docketed and the hearing thereof continued until Thursday the 19th day of December, 1901, before the Judge of this court sitting in chambers at Bristol, Virginia, at 12 o'clock M., at which time and place argument will be heard upon said motion from such counsel for plaintiff and defendant, or either of them, as may appear.

922 And it is further ordered that the clerk of this court do mail copies of this order to Marshall McCormick, at Berryville, Virginia, to Judge Wm. Robertson, Richmond, Virginia, and Frederick M. Leonard, Forrest Building, Philadelphia, Penna.

And it appearing to the court that a copy of said amended and supplemental bill so tendered as aforesaid, has heretofore been served the defendant, no copy thereof need accompany the copy of this decree.

HENRY C. McDOWELL.

District Judge.

Endorsed: Filed and entered 12/10/01.

923

Answer of 18 December, 1901.

IN THE CIRCUIT COURT OF THE UNITED
STATES,

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN,	}	Number I. In Equity.
v.		
THE BERLINER GRAMOPHONE		
COMPANY.		

924

Answer of Berliner Gramophone Company to Rule to Show Cause why it should not be proceeded against as in contempt on the injunction order entered in this cause on March 23, 1901.

The Berliner Gramophone Company, defendant, in this suit, answering the rule to show cause why it should not be proceeded against as in contempt of the injunction order entered in this cause on March 23, 1901, respectfully shows that:

922 And it is further ordered that the clerk of this court do mail copies of this order to Marshall McCormick, at Berryville, Virginia, to Judge Wm. Robertson, Richmond, Virginia, and Frederick M. Leonard, Forrest Building, Philadelphia, Penna.

And it appearing to the court that a copy of said amended and supplemental bill so tendered as aforesaid, has heretofore been served the defendant, no copy thereof need accompany the copy of this decree.

HENRY C. McDOWELL.

District Judge.

Endorsed: Filed and entered 12/10/01.

923

Answer of 18 December, 1901.

IN THE CIRCUIT COURT OF THE UNITED
STATES,

FOR THE WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN,	} Number I. In Equity.
v.	
THE BERLINER GRAMOPHONE	
COMPANY.	

924

Answer of Berliner Gramophone Company to Rule to Show Cause why it should not be proceeded against as in contempt on the injunction order entered in this cause on March 23, 1901.

The Berliner Gramophone Company, defendant, in this suit, answering the rule to show cause why it should not be proceeded against as in contempt of the injunction order entered in this cause on March 23, 1901, respectfully shows that:

928 neys and servants from PROSECUTING THE SAID
 NEW YORK SUIT, but enjoined and restrained the
 Berliner Gramophone Company from "in any wise,
 further PROSECUTING, conducting or carrying for-
 ward in any manner whatsoever, any and all of the
 MATTERS, THINGS AND QUESTIONS whatso-
 ever JOINED IN THIS SUIT" in the said New York
 suit. The Berliner Gramophone Company was ad-
 vised by counsel, and, therefore, shows to this Honor-
 able Court that the said New York suit is an action
 at law for damages, while this suit is a suit in equity,
 and that none of the matters, things and questions
 whatsoever joined in this suit are prosecuted, conduct-
 ed or carried forward in the said New York suit.
 929 And the Berliner Gramophone Company further shows
 that its counsel in so advising the Berliner Gramophone
 Company had the support of a ruling by Judge La-
 combe, of the United States Circuit Court for the
 Southern District of New York, the court in which the
 said New York suit is pending, in which the said
 Honorable Judge, upon entering an order December
 15, 1900, requiring the said Frank Seaman to an-
 swer in the New York suit, said, after an examination
 of the original bill filed in this suit and a comparison
 of it with the complaint filed in the New York suit,
 that:

930 "There is no good reason for suspending this
 cause to await the decision in the Virginia suit,
 nor for suspending the Virginia suit, to await
 this. Defendant's time to answer, however,
 may be extended, as prayed for, to and in-
 cluding December 23, default being opened."

3. The Berliner Gramophone Company attaches to
 this answer, and asks to have read as part thereof,
 marked "Exhibit 2," the affidavit of Edmund L. Bay-
 lies, its attorney in the said New York suit, together
 with the exhibits thereto attached.

4. The Berliner Gramophone Company further shows that it is advised by counsel that the DISMISSAL OF THE ORIGINAL BILL in this suit OPERATES TO DISMISS THE SUIT, and that whatever may have been the meaning and scope of the injunction order of March 23, 1901, the said dismissal of the original bill *ipso facto* operated to dissolve the said injunction order of March 23, 1901. The said injunction order of March 23, 1901, was granted upon an amended and supplemental bill and an appeal from the order granting the injunction was pending in the U. S. Circuit Court of Appeals (although not matured for a hearing), at the time when the said U. S. Circuit Court of Appeals ordered the dismissal of the original bill. At the recent hearing of the appeal from the said injunction order of March 23, 1901, in the U. S. Circuit Court of Appeals, the Berliner Gramophone Company, by its counsel, contended and insisted as a proposition preliminary to any discussion of the merits of the appeal, that:

"The dismissal of the original bill carried with it, by operation of law, the dismissal of the amended and supplemental bill."

The appeal from the injunction order of March 23, 1901, is still pending in the U. S. Circuit Court of Appeals, and the Court has not intimated what its decision will be.

5. The said Waldo G. Morse, as counsel for the said Frank Seaman, objected to the entry of an order in the New York suit, overruling the said Frank Seaman's demurrer and claimed as the ground for his objection that the Berliner Gramophone Company had in the appeal last mentioned, waived its claim to consider the dismissal of the original bill a dismissal *ipso facto* of the amended and supplemented bill, and, therefore, the injunction order of March 23, 1901, entered thereon. And the said Morse went so far as to address on November 13, 1901, to the Honorable

934 ALFRED C. COXE, Judge of the U. S. Circuit Court for the Southern District of New York, in which the said New York suit is pending, a letter containing the following statement concerning the appeal last mentioned, viz.:

"While the effect of the decree dismissing the original bill was argued by counsel and considered by the Court, neither Court nor counsel for appellant gave any intimation that the dismissal of the bill had been or was considered *ipso facto* a termination of the injunction existing based upon the amended and supplemental bill."

935 A copy of the said Waldo G. Morse's letter is hereto annexed and marked "Exhibit 3."

This statement on the part of the said Morse was false. The Berliner Gramophone Company annexes hereto, as part of this answer, and marked "Exhibit 4," a copy of its brief used in the said appeal, and referred to in the letter of the said Morse to Judge Cox. In the said brief, as will be seen by reference to page 5 thereof, the Berliner Gramophone Company's first proposition was that

"THE DISMISSAL OF THE ORIGINAL BILL CARRIED WITH IT BY OPERATION OF LAW, THE DISMISSAL OF THE AMENDED AND SUPPLEMENTAL BILL."

936 This brief and the said letter from the said Morse were before Judge Cox when he filed his order (attached to the affidavit of the said Morse), overruling the said Frank Seaman's demurrer in the said New York Suit, and ordering him to answer in thirty days.

6. The Berliner Gramophone Company further shows to this Honorable Court that the original bill in this suit was filed on June 25, 1900, and answered by the defendant, and that instead of proceeding to a hearing on the merits, the said Frank Seaman has

filed on December 7, 1900, an elaborate amended and
 supplemental bill, and is now before this Honorable
 Court, asking leave to file a second amended and
 supplemental bill of enormous proportions. And the
 Berliner Gramophone Company further shows that
 although the complaint in the said New York suit
 was filed by it on October 23, 1900, and every effort
 has been made by it to compel the said Frank Seaman
 to answer on oath the said complaint (which, under
 the rules of the United States Circuit Court for the
 Southern District of New York, the Berliner Gramo-
 phone Company is advised should have been answered
 within twenty days from October 23, 1900), yet for
 more than a year the said Frank Seaman, by one
 means and another, has succeeded in evading such an-
 swer. And the Berliner Gramophone Company fur-
 ther shows to this Honorable Court that while this
 litigation has practically ended the business of the
 Berliner Gramophone Company, yet, meanwhile, the
 said Frank Seaman is engaged, under cover of this
 litigation, not only in evading an issue, but in build-
 ing up a talking machine business hostile to the in-
 terests of the Berliner Gramophone Company, and
 directly in violation of his contract on which all this
 litigation depends.

Wherefore, having fully answered, the Berliner Gramophone Company prays that the rule against it may be dismissed.

BERLINER GRAMOPHONE COMPANY,
 by

Vice-President.

Attest.

Secretary.

940 State of Pennsylvania, } ss.:
County of Philadelphia, }

Joseph Goldsmith, being duly sworn, deposes and says, that he is the Vice President of the Berliner Gramophone Company, defendant above named, and that the matters and things set forth in the foregoing answer, are true and correct, in so far as they are within his own knowledge, and in so far as they are not within his own knowledge, he believes them to be true.

Sworn and subscribed before me
this 18th day of December, 1901.

941 Notary Public.
Filed 19 December, 1901.

Decree of 29 March, 1902.

IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA.

942	FRANK SEAMAN,	} In Equity	
	Complainant,		} No. 1.
	vs.		
	BERLINER GRAMOPHONE COMPANY,		
	Defendant.		

This day came the parties plaintiff and defendant, and thereupon the defendant moved the Court for leave to file its answer to the rule awarded against it on the day of December, 1901, and returnable this day, the 19th of December, 1901, before the

judge of this Court, sitting in Chambers at Bristol, Virginia, which motion is allowed, and thereupon the said answer of said defendant, the Berliner Gramophone Company to said rule was accordingly filed with the affidavits and exhibits attached thereto. Upon consideration of said rule, the answer of said defendant, the affidavits and exhibits filed by the plaintiff and defendant, and the record of this cause, and argument of counsel, the Court being of opinion that the defendant has violated the injunction order in this cause, entered on March 23rd, 1901, doth on this the 29th day of March, 1902.

943

Order, Adjudge and Decree, That the said Defendant, the Berliner Gramophone Company, be, and the same is hereby, declared in contempt of this Court, and doth order that the said defendant to pay forthwith to the Registrar of this Court, at Harrisonburg, Virginia, A. K. Fletcher, the sum of Five Hundred Dollars (\$500.00), to be disposed of by this Court by subsequent order to be made in this cause, and that in case the said defendant shall not forthwith, and on or before the 15th day of April, 1902, enter into a stipulation in the action at Law described in said injunction, and serve such stipulation, duly signed by its attorneys therein, upon the attorney for the defendant in said action, providing and to the effect that the time of the defendant therein to answer the complaint be extended until the said injunction order shall be vacated or modified by this Court, allowing the defendant herein to proceed with said action at Law, and a copy of such order so vacating or modifying the same shall be served upon the attorney for the defendant in said action, and for the further time and period of twenty days thereafter, then and in that event, and in default of such stipulation, it is ordered and decreed that this defendant pay likewise and in like manner to said A. K. Fletcher the further sum of One Thousand Dollars (\$1,000.00), and that plaintiff may apply and have upon the foot

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946 of this decree a further and additional order or decree for the purpose of enforcing said payment or either of them.

HENRY C. McDOWELL.
District Judge.

Enter.
March 29, 1902.
In re contempt.
Filed, March 31, 1902.

Decree of 31 March, 1902.

947 IN THE CIRCUIT COURT OF THE UNITED
STATES,

FOR THE WESTERN DISTRICT OF VIRGINIA,

FRANK SEAMAN,	} In Equity, No. 1.
Complainant,	
vs.	
THE BERLINER GRAMOPHONE COM- PANY,	
Defendant.	

948 The plaintiff in this cause, having on the 10th of December, 1901, tendered the Court sitting in Term at Harrisonburg, Virginia, his bill amendatory of and supplemental to the Amended and Supplemental Bill, and bearing teste, October 21st, 1901, and his petition that the same be allowed and filed, and having moved the Court for leave to file the same in this cause, and the said motion, having been, at that time docketed, and the hearing thereof by an order then entered, continued until Thursday, the 19th of December, 1901, before the Judge of this Court, sitting in Chambers at

Bristol, Virginia, at which time and place, the said motion was duly heard upon said petition and proposed bill, the record of said cause, and arguments of counsel, and the Court then not passing upon said motion, but taking the same under advisement, and it appearing to the Court that since the hearing upon said motion on the 19th day of December, 1901, as aforesaid, the Circuit Court of Appeals of the United States for the Fourth Circuit did, on the 2nd of February, 1902, hand down an opinion in said cause, a copy whereof is filed with the record of this cause, upon consideration of said motion the record of this cause, and arguments of counsel, it is this 29th day of March, 1902, ordered, adjudged and decreed that the plaintiff, Frank Seaman, be, and he is hereby permitted to file the said bill amendatory of and supplemental to this Amended and Supplemental Bill, bearing teste October 21st, 1901, and the same is accordingly done, to which the defendant, the Berliner Gramophone Company is allowed to plead, answer or demur, as it may be advised in accordance with Equity Rules.

Enter,
HENRY C. McDOWELL,
District Judge.

Filed, March 31, 1902.

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FOURTH CIRCUIT, MANDATE HARRISONBURG, VA.

Appellant.

vs.

Appellec.

953

Clerk.

The President of the United States, of America.

954

"The plaintiff in this cause having heretofore given the defendant notice that he would move the court on the 21st day of March, 1901, to award the special injunction against the defendant as prayed for in the first, second, fourth and fifth prayers of the amended and supplemental bill, filed December 7th, 1900, which

motion was thereafter continued until the 22nd of March, 1901, and on that day came the parties, plaintiff and defendant, by counsel, whereupon the defendant moved the court to take up and consider the demurrer filed at the January rules, 1901, to the said amended supplemental bill of the plaintiff, which motion the court granted. 955

"Wherefore the cause came on to be heard upon said motion of the plaintiff, and the demurrer aforesaid of the defendant to said amended and supplemental bill, and the cause was argued by counsel and the hearing thereof continued until this 23rd day of March, 1901. Upon consideration whereof it is ordered, adjudged and decreed that the demurrer of the said defendant to said amended and supplemental bill of the plaintiff, and each ground of demurrer therein assigned be and the same is hereby overruled. And thereupon the defendant, by leave of court, filed its answer to said bill, which the plaintiff has leave to accept or reply at May Rules, 1901. 956

"And thereupon the plaintiff, by counsel, moved the court for the injunction prayed for in the first, second and fifth prayers of said amended and supplemental bill. Upon consideration whereof the court doth order, adjudge and decree that the defendant, the Berliner Gramophone Company, its officers, agents and attorneys, be and the same are hereby enjoined and restrained, until the further order of this court, and preceding the determination of this cause, from, in any wise, further prosecuting, conducting or carrying forward in any manner whatsoever, any and all of the matters, things and questions whatsoever joined in this suit in the action at law instituted by the defendant. 957

958

the Berliner Gramophone Company, against the plaintiff, Frank Seaman, in the United States Circuit Court for the Southern District of New York, on the law side thereof on the 23rd day of October, 1900. But this injunction order shall not take effect unless and until the said plaintiff or someone for him shall execute bonds payable to the said defendant, conditioned according to law, to be approved by the court in the penalty of Fifteen hundred dollars.

959

"And as to the granting of the injunction prayed for in the first and second prayers of said bill, the court takes time to consider, and thereupon the defendant moved the court to dissolve the said injunction, herein awarded upon the record of this cause, which motion the court doth overrule."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Fourth Circuit by virtue of the appeal of the said Berliner Gramophone Company, agreeable to the act of Congress in such case made and provided, fully and at large appears.

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And whereas in the term of November in the year of our Lord one thousand nine hundred and one the said cause came on to be heard before the said United States Circuit Court of Appeals for the Fourth Circuit on the said transcript of record and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs.

CHARLES H. SIMONTON,

Circuit Judge.

Feb. 8, 1902.

You therefore are hereby commanded that such further proceedings be had in said cause by way of execution as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding. 961

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States the 22nd day of May, in the year of our Lord, one thousand nine hundred and two.

HENRY T. MELONEY,
Clerk of the United States Circuit
Court of Appeals for the Fourth Circuit.

Costs of Appellee paid by Appellant:

Clerk	\$17.30	962
Attorney	\$20.00	
	\$37.30	

UNITED STATES CIRCUIT COURT OF AP-
PEALS OF AMERICA,

FOURTH CIRCUIT.

Costs of Frank Seaman, Appellee in No. 412.

Appearance .25, filing order .25, filing briefs 5.00, filing papers .75, copies opinion furnished (being half cost of printing same Rule 28) 4.00, Judgment 1.00, filing same .25 recording .40, mandate 5.00, Attorney's docket fee 20.00, costs and copy .40, Total \$37.- 963
30. Fee Book 2, Page 482.

Teste,

HENRY T. MELONEY,
Clerk United States Circuit Court of Appeals.

Decree of 30 April, 1902.

CIRCUIT COURT OF THE UNITED STATES.

WESTERN DISTRICT OF VIRGINIA.

FRANK SEAMAN.

vs.

BERLINER GRAMOPHONE COMPANY.

In Equity.

965 This cause was further heard at Danville, Va., on April 15th. and subsequent days, on the motion of complainant for an injunction; and on petition of defendant for a rehearing of the decree of March 29th, 1902. holding said defendant in contempt. and was argued by Counsel.

The Court having considered the record and said arguments; and it appearing that the Court, in passing the decree of March 29, 1902, holding the defendant guilty of contempt, was under a misapprehension of the facts, and supposed that complainant Seaman had not been required to answer in the action at law in the United States Circuit Court for the Southern District of New York, wherein the Berliner Gramophone Company is plaintiff and said Seaman is defendant;

966 AND WHEREAS it now appears that said Seaman was required to and did file his answer in said action on December 26, 1901;

It is adjudged, ordered and decreed:

1st: So much of the aforesaid order of March 29, 1902, as requires the defendant to pay into the registry of this court the additional sum of \$1,000, if it do not on or before April 15, 1902, enter into a certain stipulation, is hereby revoked and annuled: and in lieu there-

of the defendant is now directed and ordered to pay 967
into the registry of this court, to A. K. Fletcher, Clerk,
within twenty days from the entry of this decree, the
sum of \$1,000 (which sum is in addition to the \$500
ordered absolutely to be paid by the aforesaid decree
of March 29, 1902). Said sum of \$1,000 is to be
disposed of as may be hereafter directed by order of
this court. And the plaintiff may apply and have
upon the foot of this decree such further order as may
be requisite for the purpose of enforcing the payment
of said sum.

2nd: In all other respects the petition to rehear the
said decree is overruled.

3rd: The said defendant, the Berliner Gramophone 968
Company, its *officers*, agents, servants, employees and
all persons claiming to act under its authority be, and
they are until the further order of this court hereby
enjoined and restrained from selling, delivering, or
parting with any of the gramophones, records, matrices
or goods, made by it under the patents in the said
Amended and Supplemental Bill and the said bill
amendatory of and supplemental thereto, described, or
produced under or in compliance with the contract of
October 10th, 1896, and that they be and are like-
wise and also until the further order of this court en-
joined from selling, delivering, or parting with any
goods, wherein complainant has an interest, to any
person, or persons, other than those designated by
complainant, save in so far as the said Berliner Gramo- 969
phone Company is reasonably entitled to sell and de-
liver the same to its stockholders and within the
District of Columbia, as provided by said contract and
license.

4th: The said defendant, the Berliner Gramophone
Company, its officers, agents, servants, employees, and
any of them, and all persons whatsoever acting in
conjunction or together with, for, under or by virtue
of it or its rights, be, and they hereby are until the

970 further order of this court enjoined and restrained from selling, or offering for sale, any machines, records, or other similar goods under the name, style or designation of gramophone, or gramophones, or gramophone goods, and are likewise enjoined and restrained from the use and employment of said name, Gramophone, or Gramophones, in any manner whatsoever, and from further authorizing and allowing any other person, firm or corporation, to employ or use the same, save under and pursuant to the rights and privileges acquired by reason of the contract of October 10th, 1896, with complainant Frank Seaman.

971 *Provided, however,* that the 3rd and 4th paragraphs of this decree shall not take effect unless and until the complainant, or some one for him, shall execute bond in the penalty of \$10,000, with good security, to be approved by this court or a judge thereof, conditioned to pay any costs and damages that may be incurred by the defendant, or by any other person hereby restrained, by reason of the said injunction, in case the same shall hereafter be dissolved.

HENRY C. McDOWELL,
District Judge.

April 30, 1902, Enter,

Bond executed and approved, July 23, 1900.

972 Executed by delivering a true copy of the within writ to Judge W. Gordon Robertson attorney for and the legal representative of the Berliner Gramophone Company on the street in Roanoke, Va., the place of his residence.

S. BROWN ALLEN,
U. S. Marshal.
By R. E. Haney,
D. M.

August 1st, 1902.
Filed, May 2, 1902.

Decree of 5 August, 1902.

973

IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA,

FRANK SEAMAN,
Plaintiff,

vs.

BERLINER GRAMOPHONE COMPANY,
Defendant.

It is ordered that the motion of complainant that 974
his bill amendatory of and supplemental to his amend-
ed and supplemental bill be taken *pro confesso*, and
that this cause hereafter be proceeded in *ex parte*, be
and it is for reasons filed in writing overruled.

It is further ordered that the defendant file its de-
fensive pleadings to said bill (whether demurrer, plea
or answer—one or all) on or before September Rules
1902.

HENRY C. McDOWELL,
District Judge.

August 5, 1902 enter.
Filed same day.

975

Replication Filed 24 October, 1902.

IN THE CIRCUIT COURT OF THE UNITED
STATES.

FOR THE WESTERN DISTRICT OF VIRGINIA,

FRANK SEAMAN, Complainant. vs. BERLINER GRAMOPHONE COMPANY, Defendant.	}	In Equity. No. 1.
--	---	----------------------

977 *Replication of the complainant to the answer of the
Defendant, to second Amended and Supplemental
Bill of Complaint.*

978 The replication of Frank Seaman, the plaintiff, to the answer of the Berliner Gramophone Company, the defendant, filed to the Second Amended and Supplemental Bill of Complaint: this replicant saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto, saith, that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this replicant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

FRANK SEAMAN.
By Counsel.

WALDO G. MORSE, and
SIPE & HARRIS,
of Counsel.

A Copy.

Teste.

A. K. FLETCHER.

Clerk.

979

Exhibit Y with said affidavit.

CIRCUIT COURT OF THE UNITED STATES.

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BERLINER GRAMOPHONE COM-
PANY and UNITED STATES
GRAMOPHONE COMPANY,

vs.

NATIONAL GRAMOPHONE CORPOR-
ATION.

No. 7525.

980

To the Honorable the Judges of the said Court:

Your orators, the Berliner Gramophone Company, a citizen and corporation of the State of Virginia, and the United States Gramophone Company, a citizen and corporation of West Virginia, bring this, their bill of complaint against the National Gramophone Corporation, a citizen and corporation of the State of New York, and thereupon your orators complain and say:

981

1. The Berliner Gramophone Company exclusively controls in the United States of America the inventions of Emile Berliner, made and to be made, relating to the gramophone, and the letters patent of the United States, issued and to be issued therefor, including the following patents, viz.: No. 372,786, dated November 8th, 1887, for a gramophone; No. 382,790, dated May 15th, 1888, for a process of producing records of sound; No. 534,543, dated Feb-

Pages 328-333
missing

1000

Opinion.

Daly, rec'r of the Nat. Gramophone Corp'n v. Seaman:

The plaintiff, as receiver of the National Gramophone Corporation, has brought this action for an accounting of moneys which came into the hands of the defendant in the settlement of certain litigation in which he had been engaged with the Berliner Gramophone Company, growing out of a contract existing between him and the latter corporation for the sale of talking machines. Under this contract, which may be referred to as the Berliner contract, the defendant had obtained certain exclusive rights in the marketing of
1001 the Berliner Company's goods, and, on November 4, 1896, he transferred to the National Gramophone Company—the plaintiff's predecessor in business—all his right, title, interest and property in and to the Berliner contract, in consideration of \$49,800 in stock of the corporation, the transferee; the agreement further providing as follows on the part of the defendant: "That I will use my best endeavors to secure the recognition of the said Berliner Gramophone Company of said transfer, and that in case such recognition cannot be obtained, the said party of the first part (this defendant) will act with the party of the second part and place in its charge all the business to be carried out by me under said contract, obtain and turn over to
1002 said party of the second part all goods thereunder which may be advantageously used by said company, and turn over and deliver to it all profits and advantages whatever which may be derived from said contract with the Berliner Gramophone Company." The Berliner Company refused to recognize the transfer, and, accordingly, on the first day of October, 1897, the defendant and the National Gramophone Company entered into a further agreement, which, after the recital of the first agreement and the declination of the Berliner Gramophone Company to recognize that

transferee, and further reciting that "it being deemed 1003
advisable by the parties hereto that such assignment
and transfer be modified as herein provided," reads
that "the party of the first part (the National Gramo-
phone Company) shall, and hereby does, surrender and
retransfer to the party of the second part the aforesaid
contract and agreement and all rights and privileges
thereunder. And the party of the second part (the
defendant) does hereby covenant and agree to and
with the party of the first part to sell and deliver to
it any and all gramophones and gramophone goods
which it may require in its business, so far as and as
rapidly and in such quantities as it shall be possible for
him to obtain the same under and by virtue of the said
contract and as shall be required by the party of the
first part, and that such goods be so sold and delivered 1004
at the price at which the same shall be received by him,
with the addition thereto of one percentum to such
price to cover any expenses of advertising which he
may incur and to compensate him for his risk and at-
tention in carrying on such business under such con-
tract." It is not open to question that the agreement
of November 4, 1896, evidenced an intent of both
parties that the National Gramophone Company should
receive every benefit which the defendant could enjoy
under the Berliner contract, and that the same purpose
should be carried out so far as it could be done, in the
contemplated event that the Berliner Company would
decline to recognize this assignee. The agreement of
October 1, 1897, is colored by this expressed intent, 1005
and in view of the fact that the defendant made the
original assignment in return for practically all the as-
signee's \$50,000 capital stock, the situation of the
parties does not harmonize with the construction of
the agreement contended for by the defendant, that
the first agreement was entirely swept away and that
the corporation had no further interest in the defend-
ant's rights under the Berliner contract other than as
those rights involved his ability to make deliveries of

- 1006 gramophones as stated in that agreement. As between the defendant and the Berliner Company his independence of dealing became important, according to the evidence before me as to his relation with that company, and, the assignment to the National Gramophone Company being revoked by him, he retook his status as an independent agent; but this does not mean that the relation of trustee of the profits obtained under the Berliner contract, in which he had placed himself toward the National Gramophone Company, was in anywise affected. Read in the light of the situation which existed, this agreement of October 1, 1897, was, as between the defendant and the National Gramophone Company, merely an extension of their relations as
- 1007 created under the first agreement of November 4, 1896, to meet the very contingency which that first agreement contemplated, and I am quite clearly of the opinion that for any benefits obtained by the defendant from the Berliner contract he remained accountable to the transferee—and so to this plaintiff, which succeeded to all its property rights—by reason of the actual effect to be given to the agreement in harmony with the real understanding of the parties. The fact that the plaintiff found it necessary to deal in other talking machines at a time when the defendant, through his difficulties with the Berliner Company, became unable to make deliveries, does not in any way militate against its assertion of an interest in the moneys which the defendant received by virtue of the
- 1008 Berliner contract. Nowhere in the evidence is there an intimation that the plaintiff was to retain this beneficial interest in the defendant's relations with the Berliner Company only upon the theory that it should cease business in the event of the defendant's failure to make deliveries of these particular goods, and the acts of the plaintiff in no way amount to an abandonment of such rights as it took under this agreement with the defendant. I must hold, therefore, upon the evidence before me, that the plaintiff is entitled to an

accounting as prayed, the defendant to have credit, of course, for all sums necessarily expended in procuring the collection of the moneys in suit. I have indicated upon the proposed findings submitted my disposal of the requests to find. Form of decision, embodying findings made on request, and proposed judgment may be submitted on notice of settlement. 1009

**Order Filing Record in Appellate
Division.**

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Judicial Department. 1010

Dated, New York, September 27th, 1908.

HENRY BISCHOFF,

J. S. C.

Argued by
James M. Gray,
for Respondent.

New York Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

EUGENE V. DALY, as Receiver,
Plaintiff-Respondent,

against

FRANK SEAMAN,
Defendant-Appellant.

BRIEF FOR RESPONDENT.

Statement.

Plaintiff is the Receiver of the National Gramophone Corporation, and stands in its shoes (fols. 77-78, 238, *et seq.*).

The National Gramophone Corporation was the successor of the National Gramophone Company, and stood in its shoes (fols. 91-92, 356).

On **October 10, 1896**, defendant made a contract with the Berliner Gramophone Company, which is called the *Berliner contract*, which is Plaintiff's Exhibit D. fols. 244, *et seq.*

This contract was assignable by defendant, *subject to the consent of the Berliner Co.* (fol. 256).

On November 4, 1896, the defendant assigned the Berliner contract to the National Gramophone Company by the following instrument, which is Plaintiff's Exhibit E, at folio 287, page 96.

“KNOW ALL MEN BY THESE PRESENTS,
“that I, FRANK SEAMAN, residing in Yonkers,
“County of Westchester, State of New York, party
“of the first part, for and in consideration of the
“sum of forty-nine thousand eight hundred dollars
“(\$49,800) in stock of The National Gramophone
“Company to me in hand paid at the ensembling
“and delivery of these presents, by the National
“Gramophone Company, a corporation duly or-
“ganized and doing business under and by virtue
“of the laws of the State of New York, party of
“the second part, receipt whereof is hereby
“acknowledged, have bargained and sold, and by
“these presents do grant and convey unto the said
“party of the second part, its successors and as-
“signs, all my right, title, and interest and prop-
“erty in, to and under a certain contract or agree-
“ment, dated the tenth day of October, 1896, ex-
“ecuted by and between the Berliner Gramophone
“Company, of Virginia, and myself, said party of
“the first part, and all rights and privileges se-
“cured thereby; *and agree that I will use my best*
“*endeavors to secure the recognition by the said*
“*Berliner Gramophone Company of said transfer,*
“*and that in case such recognition cannot be ob-*
“*tained, the said party of the first part will act*
“*with the party of the second part and place in*
“*its charge all the business to be carried out by*
“*me under said contract, obtain and turn over to*
“*said party of the second part all goods there-*
“*under which may be advantageously used by said*
“company. AND TURN OVER AND DELIVER
“TO IT ALL PROFITS AND ADVANTAGES
“WHATEVER WHICH MAY BE DERIVED

"FROM SAID CONTRACT WITH THE BER-
LINER GRAMOPHONE COMPANY.

"TO HAVE AND TO HOLD the said contract
and rights so transferred unto the said party of
the second part, its successors and assigns, for-
ever.

"IN WITNESS WHEREOF I have hereunto
set my hand and seal this fourth day of Novem-
ber, one thousand eight hundred and ninety-six.

FRANK SEAMAN L. S."

The National Gramophone Company at once ex-
ecuted its part of this agreement, and issued to
defendant \$49,800 out of the total of \$50,000 of its
capital (fols. 295, 302, 304).

The contingency which the parties contemplated
occurred. The Berliner Company refused to rec-
ognize the assignment (fol. 192). Thereupon the
parties agreed as follows (Plaintiff's Exhibit I,
fols. 309, *et seq.*).

"MEMORANDA OF AGREEMENT made and
entered into this **1st day of October 1897**,
by and between the National Gramophone Com-
pany, a corporation duly organized under the laws
of the State of New York, party of the first part,
and FRANK SEAMAN, party of the second part,
WITNESSETH:

"WHEREAS by an agreement dated the 4th
day of November 1896, the party of the second
part transferred unto party of the first part *cer-
tain rights, grants and privileges from the Ber-
liner Gramophone Company, under and by vir-
tue of an agreement executed by and between
said Company and the party of the second part,
dated the 10th day of October 1896, which trans-
fer it was intended and desired by the parties
hereto, should be recognized by said Berliner
Gramophone Company, and*

"WHEREAS said Berliner Gramophone Company has declined to recognize the party of the first part under *such contract*, but has continued to bill all goods to the party of the second part, and it being deemed advisable by the parties hereto that *such assignment and transfer be modified* as herein provided:

"NOW this agreement witnesseth, that for and in consideration of the sum of one dollar to each in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, the parties hereto have agreed as follows:

"The party of the first part shall and hereby *does surrender and re-transfer to the party of the second part, the aforesaid contract and agreement, and all rights and privileges thereunder.*

"And the party of the second part does hereby covenant and agree to and with the party of the first part, to sell and deliver to it, and any all Gramophones and Gramophone goods which it may require in its business, so far and as rapidly, and in such quantities as it shall be possible for him to obtain the same under and by virtue of *his said contract*, and as shall be required by the parties of the first part, and that such goods be so sold and delivered at the price at which the same shall be received by him, with the addition thereto of one per centum (1%) to such price to cover any expenses of advertising which he may incur, and to compensate him for his risk and attention in carrying on such business under said contract.

"And it is further mutually covenanted and agreed that while the party of the first first shall purchase from the party of the second part such goods in sufficient quantities to satisfy the terms of his said contract, that he shall sell to no other

"person any of such goods, and shall use his best endeavors, so far as his other appointments may permit, to advance the interests of the party of the first part in selling such goods, and that the party of the first part shall use its best endeavors to introduce such goods more generally and extend the sales of same.

"IN Testimony Whereof, the party of the first part has caused its corporate seal to be affixed hereto, and these presents to be signed by its President, and the party of the second part has hereunto set his hand and seal the day and year first above written.

"THE NATIONAL GRAMOI HONE CO.,
(Corporate Seal.)

"By O. D. LADOW,
President.

"FRANK SEAMAN."

The defendant himself, in a subsequent lawsuit, swore as follows, with respect to his understanding of this transaction:

"This matter was discussed with the Berliner Company, and they called my attention to the fact that they objected to the transfer. I had never obtained their consent to the transfer, not their written consent. And after attempting to make the transfer I discovered that there had been nothing transferred by that effort of transfer.

"Thereupon, I and the company did make an arrangement by which our attempted transfer was cancelled, and I was then put back into the position, momentarily, that I had the stock and that the transfer that I had made was to be disregarded, but was to be followed by *the best that I could do in the way of putting in a substitute for that transfer*. I believe that was it. And thereupon I made my contract with the company, giv-

ing them, so far as I could, my promise to do for them all the things that the Berliner Company "had promised to do for me" (fols. 192-193).

Thereafter, the Berliner Company violated this agreement. Defendant sued them and litigation arose. In 1903, defendant settled this litigation, and released to the Berliner Company all his rights under the Berliner contract (fol. 160), for \$70,000 (fol. 159), which he received (fol. 172).

Judge BISCHOFF held, and the court below adjudged that defendant was a trustee for the National Gramophone Corporation, of the Berliner contract, and should account to it for this money.

POINTS.

I.

Answering Appellant's Point First:

The assignment by Frank Seaman to the National Gramophone Company, dated November 4, 1896, was not abrogated by the agreement of October 1, 1897, but modified, and, as modified, continued.

Appellant in this point spends a good deal of space to show the agreement of November 4, 1896, was executory. In fact, it was partly executory on the part of Frank Seaman, and partly executed on his part, for, in so far as he could, he does "grant and convey" to the National Gramophone Company, the Berliner contract. On the part of the National Gramophone Company, this agreement was wholly executed, for the only thing the National Gramophone Company had to do was to give Seaman \$49,800 of its stock (fol. 287). This it did at once (fols. 287-303-304).

We point out a flagrant attempt to misconstrue words:

For counsel quote the second contract as follows, on page 16 of their brief:

"Now this agreement witnesseth that for and
"in consideration of the sum of One Dollar (\$1.00)
"to each in hand paid, the receipt whereof is here-
"by acknowledged, and of the mutual covenants
"and agreements herein contained, the parties
"hereto have agreed a follows: The party of the
"first part shall and hereby does surrender and
"retransfer to the party of the second part *the afore-*
"*said contract and agreement*, and all rights and
"privileges thereunder."

And then coolly say: "It is hard to con-
"ceive of any more express and complete sur-
"render and cancellation of the first contract than
"is provided in and by the operative part of the
"second, as above quoted."

*The words, "the aforesaid contract and agree-
ment" in the scrap quoted by counsel, plainly re-
fer, not to the assignment of November 4, 1896,
but to the Berliner contract of October 10, 1896.*

This is the plain reading of the contract (fols. 310, *et seq.*). The plain effect of the contract of October 1, 1897, was merely to carry out and make effectual the contract of November 4, 1896, in the face of the Berliner Company's action, and to make the defendant a trustee for the corporation.

Judge BISCHOFF's opinion on this point cannot be improved (fols. 1004 to 1007).

"It is not open to question that the agreement
"of November 4, 1896, evidenced an intent of both
"parties that *the National Gramophone Company*
"*should receive every benefit which the defendant*
"*could enjoy under the Berliner contract, and*
"*that the same purpose should be carried out so*
"*far as it could be done, in the contemplated event*
"*that the Berliner Company would decline to rec-*

"ognize this assignee. The agreement of October
 "1, 1897, is colored by this expressed intent, and
 "in view of the fact that the defendant made the
 "original assignment in return for practically all
 "the assignee's \$50,000. capital stock, the situation
 "of the parties does not harmonize with the con-
 "struction of the agreement contended for by the
 "defendant, that the first agreement was entirely
 "swept away and that the corporation had no fur-
 "ther interest in the defendant's rights under the
 "Berliner contract other than as those rights in-
 "volved his ability to make deliveries of gramo-
 "phones as stated in that agreement. As between
 "the defendant and the Berliner Company his in-
 "dependence of dealing became important, accord-
 "ing to the evidence before me as to his relation
 "with that company, and, the assignment to the
 "National Gramophone Company being revoked
 "by him, he retook his status as an independent
 "agent; but this does not mean that the relation
 "of trustee of the profits obtained under the Ber-
 "liner contract, in which he had placed himself
 "toward the National Gramophone Company, was
 "in anywise affected. Read in the light of the
 "situation which existed, this agreement of Octo-
 "ber 1, 1897, was, as between the defendant and
 "the National Gramophone Company, merely an
 "extension of their relations as created under the
 "first agreement of November 4, 1896, to meet the
 "very contingency which that first agreement con-
 "templated, and I am quite clearly of the opinion
 "that for any benefits obtained by the defendant
 "from the Berliner contract he remained account-
 "able to the transferee—and so to this plaintiff,
 "which succeeded to all its property rights—by
 "reason of the actual effect to be given to the agree-
 "ment in harmony with the real understanding of
 "the parties."

Further argument and reiteration on this point cannot make it more clear. A simple examination of the two documents, Exhibits E (fol. 287) and I (fol. 309), heretofore quoted, makes plaintiff's case.

II.

Answering Appellant's Point Second :

Nothing in the evidence justifies the proposition that the National Gramophone Corporation had terminated its relations with the defendant.

Nothing in the evidence justifies the proposition that the National Gramophone Corporation had terminated its relations with the defendant.

The "cases and briefs," cited in appellant's Second Point, consist of printed papers in actions to which neither this plaintiff nor the National Gramophone Corporation nor the National Gramophone Company was a party. They were admitted in evidence to show what were the litigations which were settled and in settlement of which defendant received money (fols. 222-223). Nothing in them binds plaintiff at all.

It is true that these litigations were carried on by defendant Seaman at his own expense, and when he accounts he will have credit for his payments in this respect. But because a trustee pays expenses of litigation over his trust, he is none the less a trustee.

The resolution of the National Gramophone Corporation, at folios 390-392, do not amount to any release by the corporation to Mr. Seaman. Their utmost effect is set forth by Judge BISCHOFF at folios 1007-1008 as follows:

"The fact that the plaintiff found it neces-

"sary to deal in other talking machines at a
 "time when defendant, through his difficulties
 "with the Berliner Company, became unable
 "to make deliveries, does not in any way mili-
 "tate against its assertion of an interest in the
 "moneys which the defendant received by virtue
 "of the Berliner contract. Nowhere in the
 "evidence is there an intimation that the
 "plaintiff was to retain this beneficial interest
 "in the defendant's relations with the Berliner
 "Company only upon the theory that it should
 "cease business in the event of the defendant's
 "failure to make deliveries of these particular
 "goods, and the acts of the plaintiff in no way
 "amount to an abandonment of such rights as
 "it took under this agreement with the defend-
 "ant."

These resolutions simply amounted to an as-
 sertion that Seaman had violated his obligation,
 and that it was necessary, in order that the corpo-
 ration should preserve its corporate life, to buy
 goods where it could, and take measures for self-
 protection.

The two resolutions which the defendant intro-
 duced in evidence are Exhibit 1, under date of
 March 10th, 1900, as follows:

"The following resolution was unanimously
 "agreed to, that the executive officers of this
 "corporation are hereby authorized to make
 "the necessary arrangements with the Uni-
 "versal Talking Machine Co. for the placing
 "of their type of talking machines on the
 "market, *provided Mr. Seaman, for any rea-*
 "*son finds himself unable to comply with his*
 "*contract as to the furnishing of gramophones*
 "*to this corporation, or to deliver such goods*
 "*as this corporation may require to fill its*
 "*orders"* (fol. 390).

This was followed by a resolution on April 2d,
 1900, Exhibit 2:

"Upon motion of Mr. Morse, seconded by

"Mr. Robinson, it was unanimously resolved
 "that whereas *Mr. Frank Seaman has been*
 "*unable to supply this corporation with such*
 "*goods as are required for the filling of its*
 "*orders*, a demand having been made upon him
 "for such goods, with which demand he has
 "been unable to comply. Now, Therefore, be
 "it resolved, that the executive officers be
 "and they are authorized to purchase and
 "ship such goods to be procured from other
 "persons as may be required to carry on the
 "business of this corporation" (fol. 392).

The effect of these resolutions is clear. Mr. Seaman, having defaulted, the corporation took such steps as it could to get goods elsewhere. *There is not a word in either of these resolutions which can be construed as a release of the defendant from any obligation that then existed.*

But, can the defendant urge his own default as a ground for releasing him from his obligations? Because he had failed to respond to the agreement which he had entered into, does that enable him to say that his liability ceases? Because the corporation, after his default, attempted to preserve its life by getting goods elsewhere, is he therefore entitled to keep in his pocket the money which he has received under his contract and trust relation?

These questions answer themselves. The defense that this conduct amounted to a cancellation of the contract, and a release of the defendant from his obligations, is as if a defendant, sued for breach of a simple contract to deliver goods, should say, "After I failed to deliver, you bought elsewhere, therefore I am relieved from any damages for my breach of contract." It is as if a testamentary trustee, used for an accounting by his beneficiary, should say, "After I had violated my trust, you ceased to demand anything more

from me, therefore I am relieved from my obligation to account."

The conversations and letters as to the contents of which oral testimony was given in behalf of the defendant, do not amount to a cancellation of the agreements with the defendant, or a release from his obligations. Whatever the contents of these letters may have been, the executive officers had no right to do anything further than the resolutions of the Board of Directors authorized them to do, and as we have seen the resolutions of the Board of Directors did not amount to a cancellation of the contract.

Mr. Seaman, who was one of the executive officers, the Treasurer, and Mr. La Dow, who was another executive officer, the Secretary (fol. 199), testified as to the contents of two letters which Mr. La Dow wrote to Mr. Seaman, in which, as these two witnesses say, they "terminated the relations" which the corporation had with Mr. Seaman (fols. 202-203).

Whatever the precise language of these letters and conversations may have been is of no moment. The only authority which the executive officers had under the resolutions of the Board of Directors was to purchase goods from some other company, in place of the goods which Mr. Seaman had failed to supply. This they did. But if La Dow, the Secretary, dealing with Seaman, the Treasurer, undertook to do anything more than this, his act was wholly void and unauthorized.

A transaction of this important nature, releasing and cancelling obligations upon which the whole life of the corporation depended, and in consideration of which the whole of its capital stock had been issued, was so far outside of the usual, ordinary, routine business of the company, as to be beyond the power of the executive officers,

and such a cancellation and release of obligations could only be effected by the action of the Board of Directors, or of the stockholders themselves.

Carney v. The New York Life Ins. Co.,
162 N. Y., 453;

Green v. I. H. Co., 84 N. Y. Supplement,
591;

Coney Island Co. v. Boyton, 87 App. Div.,
251;

Com. Wood & Cement Co. v. Northampton Co., 190 N. Y., 1 and 6.

Further, it is plain that the corporation received no consideration for any such cancellation.

Even assuming that the entire relation between the parties was measured by the contract of October 1, 1897, the proof is that the defendant violated that contract. Upon this point, the defendant's evidence makes out the plaintiff's case.

It is proven by the testimony of the defendant and his principal witness LaDow that the defendant failed to deliver goods to the company (fols. 201-211-229), that this failure seriously crippled the business of the company (fol. 202), that the company was compelled to buy its goods elsewhere, and that the defendant in violation of his express agreement, maintained an office for the sale of the Berliner Gramophone goods and that he advertised and kept such goods for sale in this office, although his contract was that he would sell exclusively to the National Gramophone Company (fols. 207-213).

This was an express violation of defendant's contract. He cannot plead in excuse any cancellation or cessation of relations with the Gramophone Company, for as we have seen, the only action of the Directors of the Gramophone Company was to order their officers to buy goods elsewhere he-

cause of his default, and he, being one of the executive officers of the company, himself, must have known of this limitation of the authority of the executive officers.

III.

Answering appellant's Point Third.

We do not see the materiality of what appellant says in his Point Third. But as far as advantage is concerned, the defendant gained a decided advantage over the corporation, if the defendant's construction of the second contract is allowed, for if defendant is right, he got back the contract which he had assigned to the corporation for \$50,000 of its stock, at the same time keeping the stock and getting one per cent. additional. Such a construction of an agreement between a corporation and its officer is abhorrent to equity.

IV.

Answering appellant's Point Fourth.

We do not admit that there ever was a "time of the cancellation of the first contract." We suppose appellant means at the time of the execution of the contract of October 1, 1897.

The court below has found that the two contracts of November 4, 1896, and October 1, 1897, created a trust relation as to the Berliner contract.

In addition, on November 4, 1896, when the first contract was made, defendant was a Director (fols. 383-296-302, *et seq.*), and President (fol. 299) of the National Gramophone Company, and on October 1, 1897, he resigned as a Director and President about one minute before the second contract was made (fol. 317), still retaining the office of Treasurer (fol. 187).

This resignation was plainly made for the purpose of the second contract.

During all the time of these transactions, therefore, he was an officer of the corporation; during all the time, except about one minute he was a Director. His dealings with the corporation are therefore to be rigorously scrutinized. The burden of proof is on him to show that his dealings were fair. All his contracts with the corporation of which he was an officer are to be construed most rigorously against him and in favor of the corporation.

V.

Answering appellant's Point Fifth, as to the relief which plaintiff seeks.

It makes no difference on appeal, what kind of relief plaintiff seeks. All that this court is concerned with is what kind of relief he has gotten by the judgment below.

All that the judgment below awards plaintiff is an accounting (fol. 119) in the ordinary form.

This is the only relief which can be had. If defendant has any offsets or equities he can set them up.

Far from being inequitable, this is the most equitable form of relief that can be imagined.

The argument of appellant, so far as we can make it out, seems to be that an accounting would be inequitable because the corporation did not take part in the litigation which defendant brought. This is a very good reason why there should be an accounting—because the beneficiary was not a party to the trustee's acts.

VI.

Answering Appellant's Point Sixth.

We do not understand this point, and we cannot see how anything in it bears on the case at bar. The National Gramophone Company was not a party to the litigation therein referred to.

We point out that there is no evidence in the case to justify the assertion at page 25 of appellant's brief that "the National Gramophone Corporation had repudiated that contract," etc.

VII.

Answering Appellant's Point Seventh.

We have, to use appellant's own words, proved that the defendant got \$70,000 upon a number of commingled considerations, among which was the discharge of the Berliner contract (fols. 156 to 165). It is for defendant, on the accounting, to show what part of this was received for the benefit of his trust. We do not have to make the separation for him. That is the function of the accounting. If matters of this sort had to be adjusted as a part of the plaintiff's case, there would be no need of an accounting. The burden is upon the accounting trustee. The plaintiff, in the case at bar, cannot in the nature of things, know what part of this money was received on account of the trust, and what on other accounts. The defendant, in the nature of things, must know.

Murriu v. Brooks, 94 N. Y., 71.

"Such a decree (for accounting) proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money or property of the other party; interested in a confidential relation with an interest which

"makes him a *quasi-trustee*, and by reason of that relation *knowing what the other party cannot know and bound to reveal to him the entire truth*. "The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and *the duty of explanation*, and hence the burden of such explanation *and the proof of its truth fell, in such cases, upon the defendant whose conduct was questioned*, "whenever an accounting was decreed, and required of him the extreme of good faith."

Marrin v. Brooks, 94 N. Y., 71-75.

VIII.

The National Gramophone Company was capitalized upon the basis of this contract with the Berliner Company (fols. 287-380). Unless the defendant gave back what he got (which he did not do), the National Gramophone Company remained, as to him, the beneficial owner of the Berliner contract."

This point speaks for itself. Mr. Seaman never did give back the consideration which he had obtained for the Berliner contract, consisting of all the stock of the company except \$200 (fols. 287-280). If the contract of October 1, 1897, be construed as an absolute cancellation and destruction of the agreement of November 4, 1896—if all the rights of the parties are measured simply by the contract of October 1, 1897, without regard to any other instrument or act, then the company was in the position of having issued its whole capital stock, and received no consideration in return, except Mr. Seaman's personal obligation to give it such goods as he could obtain from the Berliner

Company. That is, if he could not obtain any goods, the company did not get any.

A contract, such as this, made by a corporation, with one of its officers, would be abhorrent to equity. It would be void for lack of consideration, for surely Mr. Seaman's mere personal contract, unsecured, to sell and deliver to the National Gramophone Corporation "any and all gramophones and "gramophone goods which it may require in its "business, *so far and as rapidly and in such quantities as it shall be possible for him to obtain the "same* under and by virtue of his said contract" must be held as a matter of law to be something of no value.

It must be noted in addition that the corporation actually suffered loss, if the defendant's construction of the contract of October 1, 1897, is to prevail, for whereas, under the old arrangement it had the Berliner contract; under the new arrangement it had to pay Mr. Seaman one per cent. more for the goods.

IX.

The judgment should be affirmed with costs.

JOSEPH E. OWENS,
JAMES M. GRAY,
For Respondent.

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APPEAL PRINTING CO., 32-34 VESEY ST., N. Y.

Argued by
John B. Stanchfield.
Waldo G. Morse.

New York Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

EUGENE V. DALY, as Receiver,
Plaintiff-Respondent.

vs.

FRANK SEAMAN,
Defendant-Appellant.

BRIEF FOR APPELLANT.

Statement.

The appeal presented to this Court in the above-entitled action is taken from an interlocutory judgment for an accounting entered against the defendant-appellant, in favor of the plaintiff-respondent, upon a decision rendered by Mr. Justice Bischoff sitting at Special Term for the trial of equity causes.

Statement of Facts.

On October 10, 1896, the defendant, Frank Seaman, entered into a contract with the Berliner

Gramophone Co., being Plaintiff's Exhibit "D" found at folios 79, 244 of case.

By the terms of that agreement, the Berliner Gramophone Co. undertook upon its part, during the continuance of that contract, to manufacture and sell exclusively for and to Frank Seaman, therein called the licensee, the gramophones and gramophone goods made the subject of the agreement, charging therefor the cost price of manufacture, and in addition thereto, a profit of forty per centum of the manufacturing cost and ten per centum of the retail price at which the goods should be sold.

These agreements are set forth in detail in Paragraphs 2 to 9 and 17 to 21 inclusive of the contract.

The defendant, Frank Seaman, on his part, undertook under said contract, to pay the prices and royalties specified, to sell goods in certain large amounts, and to carry out various terms and provisions as to advertising and exploiting, all of which covenants are found in said contract in Paragraphs 10 to 16 inclusive. This contract was assignable, provided the consent of the Berliner Gramophone Co. should be obtained to the assignment of the same, to a corporation as agreed in Paragraph 9 of said contract.

A cursory examination of the contract will show that the defendant Seaman assumed large responsibilities, and that his realization of any benefits thereunder or returns for expenditures already made, was wholly dependent upon his continued performance of those burdensome obligations.

After the execution of that contract, an assignment of the same was made to the National Gramophone Company, subject to the contingency that the Berliner Gramophone Co. would decline to recognize the assignment, and providing as an alternative course of dealing, in that event, the holding

by the defendant Seaman for the National Gramophone Company of the beneficial interest accruing to him by reason of the contract (Exhibit E, fols. 80-84, 287 of Case).

The contemplated contingency arose, and by operation of the proviso mentioned, the legal title remained in the defendant Seaman, subject to his contract to give its benefits to the National Gramophone Company (fol. 86 of Case).

Thereafter, and on the 1st day of October, 1897, the National Gramophone Company, pursuant to a resolution of its Directors (Plaintiff's Exhibit J, fol. 86, 315 of Case), entered into a new agreement with the defendant (Plaintiff's Exhibit I, fols. 87-91, 309 of Case), providing that, for the consideration named, the National Gramophone Company should and thereby did "surrender and re-transfer to the party of the second part the aforesaid contract and agreement and all rights and privileges thereunder." That the defendant should sell and deliver to said company any and all gramophones which it might require in its business so far as he could obtain the same under his contract aforesaid with the Berliner Gramophone Co., charging only the cost to him with an addition thereto of one per centum to cover expense of advertising and compensate him for his risk and attention in carrying on business under the contract.

The defendant also agreed that he would sell to no other person so long as the company should buy a sufficient quantity to keep valid his contract with the Berliner Gramophone Co.

This contract was executed pursuant to a resolution of the Board of Directors at the National Gramophone Company, authorizing the surrender to Mr. Seaman of said prior and first contract upon his agreement to be contained in the second contract, which was made as above noted.

It will be observed by the Court that neither the resolution nor the contract in any sense or by any consideration can be held to constitute a modification of the pre-existing contract; while, on the contrary, both the resolution and the contract expressly contemplate and carry out a complete termination of the first relation, and the substitution of certain other and different rights conferred by the second contract, for the rights enjoyed under the first.

These two writings embrace all of the contracts and agreements which were entered into by said parties and fix their rights (Findings IX, X, XI, fols. 105, 106 of Case).

The defendant Seaman faithfully tried to secure the consent of the Berliner Company to an assignment of the contract so long as the first agreement was in force and under the second agreement supplied all goods so long as he could get them, thus fully performing on his part each agreement while it remained in force (Findings XIV, XV, fol. 107 of Case).

It appears by the testimony and evidence in the case, that at the time of the surrender of the first contract and the execution of the second, Mr. Seaman had resigned from his position as President and as a Director of the company (Plaintiff's Exhibit J, fols. 315, 316, 317 of Case), and through new officers, dealt with the company wholly as a stranger, being a stockholder and later being elected to the ministerial office of Treasurer.

These minutes are so conclusive, that they are here quoted at length (Plaintiff's Exhibit K, fol. 321 of Case).

"Minutes of a special Meeting of the directors of the National Gramophone Co., duly held at the office of the company, in the city of New York on the first day of October, 1897, pursuant to a call of the president.

The president then reported that the assignment of the contract between himself and the Berliner Gramophone Co. dated the 10th day of October, 1896, which document was made to this company on the 4th day of Nov. 1896 had never been recognized by the Berliner Co. in selling and billing their goods, but that all dealings had been carried on by the Berliner Company with all goods charged to him personally. The president thinking the situation undesirable owing to the facts tendered his resignation to take effect when his successor should be elected.

Thereupon it was unanimously resolved that O. D. La Dow be elected president of the Company to fill the place so made vacant.

Mr. La Dow accepted such election and took the chair. Mr. Seaman thereupon tendered his resignation as director of the company to take effect when his successor should be chosen.

Mr. W. F. Hubbard was unanimously elected to fill the place so made vacant.

It was thereupon unanimously Resolved, That the contract between the Berliner Gramophone Co. and Frank Seaman, dated Oct. 10, 1896, and assigned by said Seaman to this company upon the 4th day of Nov. 1896 be and the same is hereby surrendered and re-transferred to him upon his contract and agreement to sell and deliver to this company any and all gramophones and gramophone goods which it may require, so far as it shall be possible for him to obtain same under and by virtue of his said contract, and that such goods be so delivered and sold at the place at which the same shall be received by him with the addition of one per centum to such price to cover any expenses of advertising, which he may incur and to compensate him for his risk and attention in carrying on such business under said contract. Such contract shall provide that while this company shall purchase

from said Seaman such goods in sufficient quantity to satisfy the terms of his said contract, that he shall sell to no other person and shall use his best endeavors so far as his other appointments may permit to advance the interests of the company in selling such goods, and that this company shall use its best endeavors to introduce such goods more generally and extend the sales of the same.

"And it was further. Resolved. That the president be authorized to execute the necessary agreements to carry into effect this resolution.

"The meeting then adjourned.

"O. D. La Dow, Secretary."

Pursuant to the second agreement as proved by plaintiff, the parties proceeded with the course of their business until the arrival of a time at which the defendant became unable to obtain such goods as were required by the National Gramophone Corporation in the conduct of its enterprise.

Under this second contract, the business of the National Gramophone Corporation had been carried on so successfully that upon the second day of February, 1900, the Directors made a report to the stockholders of the corporation at a meeting then held, showing after payment of the following expenses:

Merchandise and Material Purchased,	\$206,372.12
Doubtful and Bad Accounts,	6,579.95
Dividends,	71,450.00
Expenses, including Advertising,	95,347.96

And after adding largely to the assets of the corporation, by securing patents for improvements and in other respects, a

Total Net Excess of Income over Disbursements,	\$80,479.85
And this after Paying Dividends Amounting to	\$71,450.00

The Court will also observe that the new type of machine was about to be put out at this time. We quote from the minutes of the same last quoted stockholders' meeting.

"Our new type of machine has been completed at last and will probably be put on the market the end of this month. We have hundreds of unfilled orders for these machines, which show distinct improvements over everything we have ever sold, and which will yield us a greater profit as well. Moreover, processes which have been in the experimental stage in the matter of record making are now accomplished facts. We expect the improvements of our new records will add to the popularity of the gramophone and greatly increase our record trade."

This was the "Zonophone" made by the Universal Talking Machine Company, incorporated by the counsel for the National Gramophone Company (fols. 390, 391, 477 to 509 of Case). And which all along acted in conjunction with said Gramophone Company, the Secretary of one, being President of the other, and was later acquired by the National Gramophone Corporation (fols. 200-207, 210 of Case).

The National Gramophone Corporation however, continued to act under the second contract until such time as the defendant, Seaman, became unable to obtain goods necessary for the filling of its order (Exhibits I & J).

On the 2d day of April, 1900, the Directors of the National Gramophone Company passed a resolution and thereafter caused the defendant to be notified pursuant thereto, that said corporation should procure its goods elsewhere (Finding XIII, fols. 107, 200-207, 219-225, 229-230 of Case).

Thereupon, the value of the new contract, to which allusion has already been made, became immediately apparent.

As the situation developed, the Directors of the National Gramophone Corporation were confronted by an alternative.

In case they should continue acting under the contract with Frank Seaman and taking such goods as he could furnish, it was necessary that they manufacture and deal in no other machines than those which Mr. Seaman was exploiting for the Berliner Gramophone Co.

The truth of this assertion becomes apparent when we examine the records of the cases put in evidence by the defendant, and see that the Berliner Gramophone Co. actually did bring suit against the National Gramophone Corporation to restrain infringement upon the patents of the Berliner Gramophone Co. and also the use of the name "Gramophone" in conjunction with the business of those corporations (fols. 784-801, 802-821, 843-857, 980-996 of Case).

The testimony of Mr. La Dow and Morse shows that this dilemma was clearly pointed out to the Directors (fols. 210, 220-222 of Case).

The other course, which might have been and was pursued by the National Gramophone Corporation, was to cut loose entirely from all claim of right or interest in or under the contract with Frank Seaman or his contract with the Berliner Gramophone Co. and establish itself and its subsidiary corporation, the Universal Talking Machine Co., as independent manufacturers of and dealers in gramophones and gramophone goods (Findings XVIII, fol. 108).

Mr. Seaman acquiesced in the cancellation of the contract and started in to sell on his own account independently of the corporation, such goods as he had or could obtain, pursuant to his contract with the Berliner Gramophone Co. (fol. 207 of Case).

Thereupon, the defendant, Frank Seaman, instituted the first of the long series of litigations which resulted finally in the receipt by him of certain moneys from the Victor Talking Machine Co. in settlement of all of the litigations involved, such action having been begun upon the twentieth day of June, 1900, or immediately thereafter and concluded on the 3d day of February, 1903 (fol. 150 of Case).

In the course of the conduct of said litigations, it developed that the maintenance of the suits in question was absolutely dependent upon the total independence of Mr. Seaman and his entire disassociation from the National Gramophone Corporation in every respect whatsoever, and likewise upon the entire rupture of all rights and claims which the National Gramophone Corporation had or might have, under or by reason of any of the contracts or agreements in question, or any arrangements of any kind whatsoever.

This is apparent from the constant attempts of the defendants in those litigations to show that while Mr. Seaman was enforcing his contract against the Berliner Gramophone Co., he was a party to the sale by the National Gramophone Corporation, of machines which were competing with the business and infringing upon the patents of the Berliner Gramophone Company (fols. 444-454, 459-461, 466-472, 477-509, 868-885, 924-939).

Like claims appear in a complaint served in an action brought in the United States Circuit Court, in the Southern District of New York, by the Berliner Gramophone Company against Seaman (fols. 403-445 of Case).

Throughout all transactions after the cancellation of the second contract by the National Gramophone Corporation, the defendant here proceeded solely at his own expense, and at his own risk, to

enforce his own contract with the Berliner Gramophone Co., while the officers and directors of the National Gramophone Corporation stood aside and concurred in his assumption of the sole right, duty and obligation to enforce the same, for his own benefit and at his own expense, if it were to be enforced at all (Findings XXIII, XXIV, XXV, XXVII, fols. 108-110 of Case).

And, not only did the defendant bear this brunt, but also, he sustained the weight of a suit brought against him by the Berliner Gramophone Company through Messrs. Carter & Ledyard, in the United States Circuit Court, for the Southern District of New York, to recover damages in the sum of Two hundred and fifty thousand dollars (\$250,000) for breach of his contract of October 10th, 1896, with that company (Finding XXVI, fol. 109 and fols. 693-745 of Case).

This defendant did not call upon the National Gramophone Corporation for assistance upon the ground that it was the real party in interest, nor did that company in any way recognize any liability, either legal or equitable, or claim any rights, but, on the contrary, as all along, both parties still continued to treat their relation as at an end (Finding XXIX-XXXII, fols. 209, 110 of Case).

Beside all this, the counsel for the plaintiff introduced in evidence the petition and schedules upon the dissolution of the National Gramophone Corporation.

This petition and the schedules annexed to the same, signed by the officers and a majority of the Directors of the National Gramophone Corporation, set out as required by the statute, all of the assets and liabilities of the corporation sought to be dissolved. Among the assets are set forth all of the property both tangible and intangible of the corporation and of every kind and nature.

cluding patents, trade-marks, good-will, contracts and all similar matters. Among the schedules of assets, is found no reference to or indication of any right, claim, demand, value or asset, existing for the benefit of the corporation in, to, under or by reason of, the contract between the Berliner Gramophone Co. and Frank Seaman, or any contract between Frank Seaman and the National Gramophone Corporation referring thereto; verbal or written, executed or executory, in possession or in action (Plaintiff's Exhibit C, fol. 243 of Case).

And now this plaintiff suing as Receiver of the National Gramophone Corporation has brought this action on the equity side of the Court asking the defendant to account to him.

The complaint sets up certain of the facts and then alleges that the defendant recovered certain damages by reason of a breach of said contract between the Berliner Company and himself (fols. 16 to 24 of Case).

The defendant answers setting up among his defenses one of a preliminary nature under a denial of the appointment and authority of the plaintiff as Receiver by reason of the fact that the proceeding wherein his appointment was had is one brought under the laws of the State of New York to dissolve an insolvent corporation and argued that as such the same was a bankruptcy proceeding taken under a statute the operation whereof had been suspended by the enactment of the National Bankruptcy Law which became upon its passage the only statute applicable to such cases.

This allegation of the answer appears at folios 29 and 30 of the case and the argument presented to the Court below appears at folios 138-140 of the case; no further discussion than so presented to the Court below being attempted in this Court,

saving to refer to the 1, 2 and 3 findings of fact at folio 102, and the allegation of the appointment of the plaintiff as Receiver so put in issue.

The answer denies the agreement set up in the complaint whereunder the plaintiff seeks to recover, also that the matters and things set forth in the complaint resulted in any loss or damage to the National Gramophone Company or the plaintiff, and that any suit was instituted as alleged in the complaint for the benefit of said company, such denials appearing at folios 31, 32 and 33 of the case on appeal.

The defendant in his answer thereupon proceeds to set up the cancellation and annulment of the contract or agreement alleged in the complaint, by mutual consent of the parties thereto, and the substitution of a new and different arrangement therefor; and further, alleges that at all times said corporation acted upon and ratified said cancellation and refused and disclaimed any and all interest and responsibility by reason of the matters and things set forth in the complaint as entitling the plaintiff herein to an accounting.

The issue so joined was tried without material disagreement as to the cardinal facts involved and made the subjects of proof, the case having been decided upon inferences drawn from facts established by the evidence as to the intention of the certain parties involved, and certain other conclusions as to what had been intended by the parties by certain of their acts and contracts concerning which the plaintiff offered no evidence, other than the proof of the documents claimed to be open to a construction differing from the expressed intention of the parties.

As a result of the trial, the Court below was persuaded to hold established without any evidence and to infer without proof in support of the as-

assumption, that certain written agreements do not mean that which they purport to express, and disregard the testimony of two credible and uncontradicted witnesses to the effect that the agreements were understood and acted upon by the parties in exact conformity with this apparent and plain meaning and intent.

The plaintiff upon the trial offered no verbal testimony whatever, but introduced in evidence numerous exhibits, the genuineness of which was conceded by the defendant in all cases, and read in evidence the deposition of Frederick M. Leonard taken in the City of Philadelphia, State of Pennsylvania, prior to the trial, and which deposition went no farther than to prove certain other agreements, showing the manner in which defendant received the monies in question, all of which matters will be discussed later in the course of the argument.

The only other evidence offered by the plaintiff consists of a portion of the cross-examination of the defendant in this action, had in a certain other action entitled *Mackay v. Scaman*, as the same appeared in a printed record on appeal of said last mentioned case.

By such cross-examination counsel for the plaintiff apparently attempted to show by the oral testimony of the defendant in said other case had upon cross-examination, and at a time when the facts concerning which he was then interrogated were not involved in the issue before the Court or fresh in the mind of the witness, and at a time when the recollection of the witness as to transactions long past had not been called to the subjects involved in the examination, that the documents in this case already introduced by the plaintiff in evidence are not in fact as so proved by plaintiff, or

that in such former trial the defendant in this action had been mistaken at the time of testifying in regard to the legal effect of such documents and resolutions which are correctly and fully proved in the present action as conceded by both parties and only concerning the proper interpretation whereof is there controversy in this case. Indeed, should the plaintiff be held bound by such interpretation so read, his cause of action as set forth in the opinion of the Court below would be wholly destroyed.

Any argument based upon such cross-examination so read into the present case in narrative form from a case on appeal in which the testimony was immaterial to the issue, cannot be considered as having any effect, saving as bearing upon the accuracy with which the defendant remembered transactions and the credibility of his testimony, if, indeed, it is entitled to be considered seriously even for such purpose.

In disposing of the issues the Judge before whom the case was tried so fully found the facts established by direct proofs, and the Court in its findings so fully, fairly and frankly stated all which bore in favor of the defendant so far as the Trial Judge appreciated their weight and import, that in his main contentions with relation to the law, the defendant may rely upon the findings of fact, and need only in a very few respects call the attention of this Court to any evidence tending to enlarge or vary a finding of fact, or to establish a fact not found.

ARGUMENT FOR APPELLANT.**FIRST.**

The first agreement between the company and Frank Seaman was executory, not executed, and was abrogated by the second agreement.

An executory contract, such as that involved, being one not making a conveyance, but to use endeavors to secure a conveyance, and failing that to do and perform certain things, is at all times subject to modification by the parties without any reconveyance.

The mutual consent to a new or altered relation furnishes a good and valuable consideration moving from each party, to support the new undertaking of the other.

Even should defendant concede, as argued by counsel for the plaintiff, that the second contract is a modification of the first, still, the first contract being executory, the second contract would absolutely supersede it as soon as agreed to by the parties in interest.

It is true that the preamble of the second contract recites that whereas the said "Berliner Gramophone Co. has declined to recognize the party of the first part under such contract, but has continued to bill all goods to the party of the second part, and it being deemed advisable by the parties hereto that such assignment and transfer be modified as herein provided."

It is apparent that not only is said first contract modified by the second contract, as is therein provided, but also that such modification cuts off all trust relation because the second contract

supersedes the first in all particulars wherein the two do not coincide.

Spier v. Hyde, 78 App. Div. (1st Dep.), 151.

Mayor v. N. Y. R. Co., *et al.*, 146 N. Y., 210.

McCreery v Day, 119 N. Y., 1.

Oregon Pacif. R. R. Co. v. Forrest, *et al.*, 128 N. Y., 83.

Eames Vacuum Brake Co. v. Prosser, 157 N. Y., 289.

A contract may be discharged by an alteration by the parties in its terms which substitutes a new agreement for an old one. * * * A claim under the original contract may then be met by the new agreement so far as the latter operates to alter or rescind the former.

The change of rights and liabilities and consequent extinction of those which before existed forms the consideration on each side for the new contract.

Lawson on Contracts, star page 395, and cases cited.

Anson on Contracts, 276.

The said second contract is as follows:

"Now this agreement witnesseth that for and in consideration of the sum of One Dollar (\$1.00) to each in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, the parties hereto have agreed as follows: The party of the first part shall and hereby does surrender and retransfer to the party of the second part the aforesaid contract and agreement, and all rights and privileges thereunder."

It is hard to conceive of any more express and complete surrender and cancellation of the first contract than is provided in and by the operative part of the second, as above quoted.

It is not deemed that any repugnancy exists between the recital and the agreement based upon the recital, but should such repugnancy be argued by counsel for the plaintiff, it will be quite apparent to the Court that the earlier recital must fall and the later and more explicit and exact covenanting paragraph following must prevail. This is the more apparent by reason of the express and emphatic language contained in the resolutions of the Board of Directors authorizing the cancellation of the first and the execution of the second contract, as set forth in the minutes of the meeting of October first, 1897, already and heretofore cited in this brief.

Burr, et al. v. Amer. Spiral Spring Butt. Co., 81 N. Y., 175.

Stettauer v. Hamlin, 97 Ill., 312.

Dawes v. Prentice, 16 Pick. (Mass.), 435.

Emery v. Fowler, 38 Me., 99.

SECOND.

The conduct of the parties and the whole course of the business and litigation made the subject of the action negative the construction of the contracts contended for by respondent.

The National Gramophone Corporation by the action of the Berliner Gramophone Co. was put to its election of alternatives.

Either it must:

First, Stand by the Berliner machine, sell no

other and suspend business during the progress of a suit to be brought by Frank Seaman in its interest, or

Second. It must cut loose wholly from all claim or interest under the Seaman contract or connection with Seaman and cancel the whole arrangement in order to avoid injunction against its infringement of the Berliner patents by reason of its privity in relation.

This result was not brought about in any degree by the act or omission of the defendant Seaman. On the contrary the evidence does disclose continued and diligent performance by the defendant Seaman of his contract with the Berliner Gramophone Company, and that the only default preventing the receipt of goods was on the part of the Berliner Co., and the Trial Court so finds, Findings XIV, XV (fol. 107 of Case).

That these relations were terminated, this Court can hardly fail to find upon an examination of the extracts from the printed records of the litigations involved (fols. 523-527, 534-539, 541-572, 627-651, 652-654, 657-686, 688-690, 907-909, 916-919, 921-922, 942-975). These records fill Volumes VI and VII of the "Cases and Briefs, Waldo G. Morse," and also the three typewritten bills of complaint in the suits of Frank Seaman against the Victor Talking Machine Company.

The records and briefs show, at every turn, not only that the National Gramophone Corporation has terminated this contract with the defendant, Seaman, but that the decisions rendered in those cases could not have been had, but for such termination.

The last printed papers so abstracted in this record, consist of the briefs in suits brought in the United States Circuit Court for the District of New

Jersey by Frank Seaman, *et al.*, against the Victor Talking Machine Company; the suit which was argued, but never brought to decision, and also all the defendant's affidavits therein with copies of exhibits attached. These are the suits in which the plaintiff's moving papers were offered in evidence in typewritten form and not printed.

~~These are the suits in which the plaintiff's moving papers are in typewritten form and not printed.~~

The argument for the complainants is, however, printed, being the brief next to the last in said Volume. In that brief is set forth at page 65, a list of the reported adjudications had in the litigation which was settled as proved in this action, as follows:

Berliner Gramophone Co. v. Frank Seaman, 110 Fed., 30.

Berliner Gramophone Co. v. Frank Seaman, 113 Fed., 750; 115 Fed., 806.

Seaman v. Johnson, 106 Fed., 915.

Johnson v. Seaman, 108 Fed., 951.

U. S. Gramo. Co. v. Seaman, 113 Fed., 745.

Berliner Gramo. Co. v. Seaman, 111 Fed., 679.

All this was done and carried on and the expense borne by the defendant, Seaman, as we have seen in our review of the evidence. The witness La Dow, testified that even his expenses as a witness were paid by Mr. Seaman, although, he, La Dow, was then an employee of the National Gramophone Corporation; and the witness Morse, testified that, so far as he knew, the corporation never paid anything toward the litigation; but, on the contrary, that Mr. Seaman paid individually and personally, absolutely all of the expenses (fols. 199, 209 of Case).

Then follows the utter absence of any claim made by the officers of the corporation in its schedule of assets, to any right or interest existing in the corporation by reason of the contracts in question, as more fully pointed out in the memorandum of facts (Exhibit C, fol. 243 of Case).

Far more than giving color to the interpretation of the second contract is the force of this course of dealing. It is enough of itself to terminate the first agreement. Any circumstance or course of conduct from whence can clearly be deduced an agreement to put an end to the original contract, will amount to a rescission of it.

Harrison v. Polar Star Lodge, 116 Ill.
279.

The defendant had long acted upon the rescission initiated by the National Gramophone Corporation, of the first contract between the parties, and now comes that corporation and by the most solemn act of a majority of its board of directors in the performance of their last official act, further confirms and effectuates such cancellation.

The act which for the corporation terminated and for the Receiver initiated legal life and existence, ratified the termination of all rights under the contract in this suit by the Receiver relied upon.

In case of any ambiguity, the practical construction placed upon a contract by the parties, and acquiesced therein, is controlling.

Ulster & Del. Blue Stone v. Carlin, 69
App. Div., 426:

Camardella v. Holmes, 97 App. Div., 120
(at p. 122):

Tauchenbaum v. Levy, 83 App. Div., 319
(judgment affd., 178 N. Y., 594):

THIRD.

The advantages of the second contract were greater to the corporation than those of the first, and in any event no attempt has been made to invalidate the second contract.

The Court will observe that, under the second contract, the defendant Seaman, became responsible to the Berliner Gramophone Company for large quantities of goods, which he furnished to the corporation, allowing it credit for the same, as appears by the large amount of the indebtedness shown in the schedule of liabilities in dissolution proceedings to be due Seaman from the corporation. Moreover, by virtue of the advantages of the second contract, the National Gramophone Corporation could proceed to prepare itself for a supply of machines in case the Berliner Gramophone Company should fail to carry out its agreement with Mr. Seaman, and supply him with goods available for the use of the National Gramophone Corporation.

The plaintiff in no way attacks or seeks by pleading or proof to overturn, rescind, modify or in any way disaffirm this second contract and is absolutely bound by its terms.

FOURTH.

The appellant, Frank Seaman, at the time of the cancellation of the first contract, did not occupy a trust relation to the corporation for which respondent is Receiver.

Upon the formation of the National Gramophone Corporation, as the Court will see by reference to the minutes put in evidence, the defendant took no

part further than to come in and exchange the stock in the former company for his stock in the successor.

Moreover, upon the organization of neither company, did the defendant act as promoter; but on the contrary, in each case the organization was conducted by others.

No vestige of contractual or other relation tending to charge the defendant with any obligation to account further than what might be argued from the written contracts or disclosed in the resolutions of the Boards of Directors, is to be found in the case, and the Court below expressly finds that none existed (Findings of Fact V, VI and VII, fols. 103 and 104).

At the time of the cancellation of the first contract the appellant was neither officer or director of the corporation (fols. 317, 318 of Case).

As a stockholder Frank Seaman, the appellant, occupied no trust relation with the National Gramophone Corporation, and dealt with it as a stranger.

Gamble v. Q. C. W. Co., 123 N. Y., 91.

Bird Coal Co. v. Humes, 157 Pa. St., 278.

FIFTH.

The plaintiff seeks inequitable relief.

It would be highly inequitable that the plaintiff, representing the National Gramophone Corporation, should recover in the present action, or that an accounting should be ordered.

The corporation terminated the contractual relations; the defendant accepted the termination and continued in the business on his own behalf, and for his own account, and this with the full knowledge and consent of the National Gram

Corporation. After a most arduous litigation conducted by the defendant, for a period extending two years, he failed to revive the contract with the Berliner Gramophone Company, and was only to compromise upon the payment to him of a sum of money by way of damages.

The litigation, as we have already seen, was and desperately contested. Alarming claims were made by the Berliner Gramophone Company against Frank Seaman, one suit having been brought for \$250,000 damages, by reason of his alleged breach of contract. In all this, Mr. Seaman was liable to lose the entire amount of the cost of the litigation, and he also was in danger that a jury might assess against him claims for damages by reason of his conduct and suits.

He had entirely broken up and stopped the business of a large corporation, the Berliner Gramophone Company, and in doing this, he took the chance that he would be able to sustain his position that they and not he had broken the contract in question. This burden was by no means light, as the printed cases and records put in evidence by the defendant will amply show.

By a fortunate stroke in the litigation, which the court will observe in the motion for a preliminary injunction made in the last suits, those brought against the Victor Talking Machine Company, a settlement was forced and the defendant, Frank Seaman, one of the plaintiffs in that suit, realized a certain sum.

As we have previously seen, during all this time, the National Gramophone Corporation and its officers stood aside making no claim whatever to an interest in the subject of the actions, and offering not the slightest aid or support in the conduct of the litigation.

That the corporation was consistent and advised in so doing is apparent from the absence, from its

schedules of assets, of any claim or suggestion in relation to the litigation involved, or to the contracts upon which it was founded.

The schedule of liabilities of the National Gramophone Corporation, on the other hand, wholly failed to disclose any debt or liability fixed, or to be ascertained, absolute, or contingent or, of any nature whatsoever, under or by reason of, the litigation upon which the plaintiff, this Receiver, now seeks to realize profits.

So we have reached the proposition that the plaintiff here, undertakes to show that the defendant, Frank Seaman, in collusion with the officers and the Directors of the National Gramophone Corporation, and by their aid and assistance, and that of their employees, imposed upon the Courts of the United States, in various districts, by proving, in such courts, that no relations existed between The National Gramophone Corporation and Frank Seaman, and by reason of such proof succeeded in defrauding the Berliner Gramophone Company and the Victor Talking Machine Company, or others, who settled the final litigation, out of a large sum of money.

That the profits of such conspiracy, having come into the hands of the defendant, Seaman, this plaintiff, the Receiver of one of the conspirators, will now proceed to prove the crime and its successful accomplishment, and the profits derived therefrom, and having convinced this Court that the evidence produced in the United States Courts was fraudulent and maliciously suborned in the first place, and that in the second place, the Courts, in finding the facts, as established by that evidence, were in error, and will now seek to have this Court hold that such Receiver is entitled to a share of the plunder, and further that this co-conspirator with the National Gramophone Corporation, now account to its Receiver for the entire booty so obtained.

In fact the Receiver seeks to recover not only a share of the plunder, but its entire amount.

As against this remarkable contention, the defendant sets up all the evidence produced by him including testimony by officers and employees of the National Gramophone Corporation in the United States Courts; alleges the correctness of the findings of those Courts, that he and not the National Gramophone Corporation was the real and only party in interest; and that in settling the cases involved, he acted in harmony with the evidence and with the decisions of said Courts and for his own account and not for the account of the National Gramophone Corporation.

SIXTH.

The action taken by the Corporation under the second contract, would have defeated Seaman's recovery if taken under the first and would have destroyed the fund now sought to be recovered.

Had the corporation at the time of the litigation brought against the Berliner Company by Seaman held its interests under the first contract above set forth, then indeed the corporation and not Seaman would have been the real party in interest and Seaman but an agent or Trustee enforcing the rights as the Court below will hold.

But the National Gramophone Corporation had repudiated that contract. It had openly disavowed it and attacked the standing of the gramophones manufactured by the Berliner Company and made the subject of that contract.

Is it conceivable that had such circumstances, as in this action alleged, existed, a Court of equity could for one moment be persuaded to issue its in-

junction restraining the breach of a single covenant in that contract contained?

Let this Court consider how strongly the defendants in those cases urged upon the Courts such arguments (fol. 44-509, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Then let the Court search for the evidence upon which the Court below could properly base its finding that during all the time of such litigation the trust relation predicated by the plaintiff in fact existed.

The basis of the injunction relief is thus set forth in one of the briefs and may well be quoted as a memorandum of authorities.

"FIRST.

"Appellee is, within well established precedents, entitled to all of the relief afforded by the decrees entered.

"Courts of equity will enforce specifically the performance of the affirmative agreements arising out of complex modern business relations. "In the increasing complexity of modern business relations, equitable remedies have necessarily and steadily been expanded and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies, 'so that they shall correspond both to the primary right of the injured party and to the wrong by which that right has been violated.'"

Opinion Fuller. C. J., U. P. Ry. Co. vs. C. & C., Ry. Co., 163 U. S., 601, quoting Pomeroy's Equity Jurisprudence, Sec. 111.

"In the above case the Court enforced specifically a contract for the joint use of a railroad track and cited Joy vs. St. L., 138 U. S., 1; Franklin Tel. Co. vs. Harrison, 145 U. S., 459; in which the main-

tenance of a private telegraph line was commanded and enforced, and also Prospect Park, &c., R. R. Co. vs. Coney I. & B. Co., 144 N. Y., 152; R. R. Co. vs. Alling, 99 U. S., 463; Express Cases, 117 U. S., 1.

"In the case first above cited not only was every consideration of public interest lacking, but one of the Justices dissented upon the express ground that the contract sought to be enforced, and of which the Court decreed a specific performance, was against public policy. In none of the cases had the public any concern to secure an enforcement.

"SECOND.

"A contract containing a negative covenant will be enforced specifically through a restraint of the act covenanted not to be done.

"The contract for the sale of chattels exclusively to complainant contains an express negative covenant.

"A negative covenant is one in which a party obligates himself not to do or perform some act.

Bouvier's Law Dictionary, 469 (Rawle Ed.).

"A contract containing a negative covenant will be enforced by injunction through a restraint of the act covenanted not to be done.

- : High on Injunctions, 877, *et seq.*
- : Dietrichfen vs. Coburn, 2 Ph., 52.
- 1 Coop. temp. Gottenham, 72.
- Donnell vs. Bennett, 22 Ch. Div., 835.
- Stiff vs. Cassell, 2 Jur. N. S., 348.
- Barfield vs. Nicholson & St., 1 S. C., 2.
- S. J. Ch. 90, Bishpham's Principles of Equity (5th Ed.), 577; 6th Ed., Sec. 461.

"THIRD.

"A contract containing both positive and negative

stipulations will be enforced through a restraint of the act agreed not to be done, even when the Court cannot superintend the enforcement of the covenants of a positive nature.

"In a contract containing a stipulation to sell specified chattels only to complainant, equity will enforce the negative stipulation in cases in which the Court is unable to superintend the performance of the positive one, thus by preventing profit to the wrongdoer through a breach, inducing it to perform its covenants.

- 1 Beach on Injunctions, Sec. 446.
- High on Injunctions. 870-904, 416.
- Foster's Federal Procedure, Sec. 220.
- Bishpham's Principles of Equity (5th Ed.), p. 577.
- Waite's Actions and Defences, p. 693.
- Hart vs. Herring L. R., 8 Ch. and App., 860.
- Lumley vs. Wagner, 1 DeGex M. and G., 604. and many cases cited by Mr. High at page 902.
- Standard Fashion Company vs. Siegel-Cooper Co., 157 N. Y., 60.
- Goddard vs. American Queen, &c., 44 App. Div. (N. Y.), 454.
- Singer vs. Union B. H. Co., 1 Holmes, 253.
- Goddard vs. Wilde, *et al.*, 17 Feb. Rep., 846.
- C. & A. R. R. Co. vs. N. Y., &c., R. R. Co., 24 Fed. Repr., 516.
- Lacy vs. Houck, 12 Weekly L. B. (Ohio), 209.
- W. U. Tel. Co. vs. U. P. Ry. Co., 3 Fed. Repr., 429.
- W. U. Tel. Co. vs. St. J. & W. R. R. Co., 3 Fed. Repr., 434.
- W. U. Tel. Co. vs. Rogers, 42 N. J. Eq., 311.

“FOURTH.

An injunction in such cases will be granted even though the only negative covenant be one inferable from the positive, in instances where the chattel has particular or special value to complainant or is the subject of monopoly.

High on Injunctions, 870.

Equitable Co. vs. Balto. Co., 63 Md., 285.

3 Parsons on Contracts, 370-3-7.

2 Story's Equity Jurisprudence, Secs. 718-725.

3 Pomeroy's Equity Jurisprudence, 441-4457, Secs. 1292-7.

Pomeroy's Specific Performance Contract, Sec. 15.

“The part payment shown by appellee and his special interest in the matrices entitle him to equitable relief.”

SEVENTH.

Respondent proves the payment to appellant, of a sum of money upon a number of commingled considerations in one only of which is respondent in any event interested.

The proof in this respect is too indefinite to justify any relief by way of accounting.

It would be impossible to separate and disentangle the various considerations set forth for the payment proved (Plaintiff's Exhibit Settlement Agreement, fols. 156-166 and Put and Call Agreement, fols. 167-171).

The proof is sufficient to establish that any payment was made because of the settlement of any claim for damages as pleaded in the complaint.

EIGHTH.

It is respectfully submitted that the judgment should be reversed and the complaint dismissed with costs.

WALDO G. MORSE,
Attorney for Defendant-Appellant.

JOHN B. STANCHFIELD, and
WALDO G. MORSE.

Of Counsel.

[4647]

New York Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

EUGENE V. DALY, as Receiver,
Plaintiff-Respondent,

vs.

FRANK SEAMAN.
Defendant-Appellant.

Brief for Appellant in Reply.

In his brief, the counsel for respondent urges that it would be abhorrent in equity, that the defendant be allowed to keep the consideration which he received for the Berliner contract, and remain in possession of the consideration which passed from him to the National Gramophone Company.

To this contention we may readily assent for such was not the transaction nor was such a result achieved by means of the substitution of the second for the first contract.

If, by reason of such substitution,—a step essential to the eventual introduction of the Zonophone in place of the Gramophone,—the National Gramophone Corporation sustained any loss or suffered any disadvantage; such fact has not been made to appear nor has any evidence been introduced from which such loss may be inferred. The injury, if

any, suffered by that corporation, resulted either by reason of the refusal of the Berliner Gramophone Company to perform its contract, or because of the inability of the National Corporation to finance the introduction of its own machine, the Zonophone. The very heavy and burdensome royalty and other payments, to the Berliner Company had been eliminated by the change and the National Company had at least a fair business opportunity. That the management long afterwards determined upon a voluntary dissolution, coupled with the substitution of contracts, does not tend to charge the obvious purport of the proof; that the loss under the contracts, if any, was that occasioned by the wilful breach by the Berliner Gramophone Company of the contract on its part, which loss, so far as the parties then could see, and in relation to the information upon which they acted, and in fact as shown by the course of subsequent litigations, would have been as great under the one contract between the defendant here and the National Corporation, as under the other.

In the principal brief for appellant, is indicated the evidence in the case showing that the defendant in no way controlled the action of the corporation or its policy and that the new contract was substituted for the old with a definite purpose and for good and sufficient reason. The litigation maintained by defendant, relieved the National Gramophone Corporation from competition, a very great immediate advantage, and ultimately and by reason of a fortunate turn in that litigation, realized a profit for defendant rather than entailing heavy losses.

In the brief for respondent, counsel, seeing the beginning from the end, seeks to have the Court consider the entire course of the business reviewed in the light of an eventual knowledge, and would

judge of the acts and contracts of the parties as though had and made by actors who knew the end from the beginning.

Such methods of argument will hardly do in applying the rules of law to the interpretation of contracts and administering equity between litigants.

With this word to burst the bubble of assumed moral turpitude, neither proved nor to be inferred from anything in the record, the subject might be dismissed, but it is deemed useful to collate in a few lines, the matters discussed in appellant's principal brief, to which the rule applies, and to enumerate the acts and contracts which must be judged by the position, knowledge and outlook of the actors at the several points of action as to time.

The National Gramophone Company held certain rights in and under two executory contracts, one between the Berliner Gramophone Company and Frank Seaman, and the other between Frank Seaman and the National Gramophone Company. Frank Seaman performed his contract, but the situation was considered undesirable because of the attitude of the Berliner Gramophone Company.

Thereupon the National Company desired that its relation with Frank Seaman be changed and the first contract was superseded by the second.

Frank Seaman then performed all of his obligations under the second contract, using his best endeavors to get goods for the National Company, or rather for its successor in interest, the National Gramophone Corporation.

But the Berliner Company broke its contract and by reason of such breach the damage suffered by the National Corporation arose. Had the first contract with Seaman then been in effect, the damage to the business, if any, would have proved just as great, for no more gramophones would have

...more under the one than under the other. Indeed the damage would have been greater, because of the necessity, so long as relief in equity under the Berliner contract should be desired, that the National Gramophone Corporation comply with all of its terms.

Then, cutting wholly loose from the defendant, the National Corporation, upon its own account, through its subsidiary, the Universal Talking Machine Company, embarked boldly and largely upon the enterprise of manufacturing and selling talking machines upon their own account, free from all of the burdensome royalties, restrictions and percentage of profits, contained in the Berliner contract.

What reasons, conditions or motives may have led to a voluntary dissolution of the National Corporation, are not subjects of proof in the record now before the Court, nor are they pertinent to the present inquiry, save in so far it appears that the defendant was in no way a party thereto or involved therein.

Frank Seaman.

The testimony of the defendant himself given in another case, has been fully considered in the brief for appellant, in chief, and we may now refer to certain points upon other issues as enumerated in the brief for respondent.

Respondent's Point I.

The agreement was wholly executory on the part of Frank Seaman, for his "grant and convey" was subject to the obtaining of the consent of the Berliner Gramophone Company to the making of the conveyance and was not to take effect or to "grant and convey" anything until such consent, as a condition precedent had been secured.

This condition precedent having failed to arise, the defendant "granted and conveyed" nothing, but on the contrary, by the express provisions of the instrument, the parties fell back upon his agreement to sell goods; an executory contract calling for acts constantly to be performed; and such was the course of business thereafter as shown by the evidence.

Again—

Counsel for respondent in pointing out a flagrant attempt to misconstrue words, as they phrase it, give as their construction of the Second Contract, precisely the meaning which counsel for appellant struggled to express intelligibly, in the statement of facts found at page 3 of their brief, namely, that the National Gramophone Company did

"Surrender and retransfer to the party of the
"second part the aforesaid contract and agree-
"ment and all rights and privileges thereun-
"der,"

that is, the Berliner contract in the brief theretofore described under which this appellant, so being and becoming the sole beneficiary and owner, is alleged by the respondent to have secured certain profits for which the appellant must now account in equity, as it is argued, to the Receiver of the Corporation which had as aforesaid, among various and other means of making respondent's position inequitable and illegal, entered into an agreement whereby it did "Surrender and retransfer * * * *all rights and privileges* thereunder" to appellant, said surrender thereupon having been for a long time acted upon and recognized by both parties.

What rights or privileges may have survived in the National Gramophone Corporation after this retransfer are not apparent to the counsel for appellant, but counsel for respondent argues that the

right to a suit in equity to enforce a specific performance of the contract so retransferred; all rights and privilege whereunder had been so surrendered; is one such, and that accordingly the results of such litigation, conducted by the appellant belong to respondent.

This statement might seem sufficient, but the argument drawing the conclusions from the facts, goes still farther; for as the only subject-matter of the first contract between appellant and the National Gramophone Company, was the Berliner Contract, counsel for appellant contend in their argument that a surrender of all rights and privileges in the Berliner Contract, is an express and complete surrender and cancellation and abrogation of the first contract executed between the appellant and the National Gramophone Corporation.

That contract had no life substance or being in effect, save as a means whereby advantages to arise under the Berliner contract should be transferred, and when all such advantages were surrendered and expressly relinquished, the contract by which the relinquished rights had arisen, was itself in fact and in law and in regard to all rights which were by it conferred, surrendered, retransferred and cancelled.

Respondent's Point II.

In this point counsel for respondent make certain arguments which seem to require no other answer than a correction of the statements of alleged fact upon which they are based and a reference to the earlier brief for appellant.

At pages 10, 11 and 13 of the brief for respondent, appear the insinuation and then the assertion, that Mr. Seaman had "violated his obligation," had "defaulted," and that his action was "An express violation of defendant's contract."

On the contrary, the evidence and the findings of the Court below are incontrovertibly to the effect that Mr. Seaman in no way violated his obligation, and never defaulted. He first contracted to convey, subject to the consent of the Berliner Company, and next contracted to deliver goods so far as he should be able to secure the same from the Berliner Company. Both of these agreements, in spirit and to the letter, were observed, kept, performed and fulfilled by Mr. Seaman. The conduct of the defendant after the Gramophone Corporation repudiated its contract and ceased to take goods, was surely no breach on his part.

The appellant committed no breach and suffered no default, and the question of respondent whether the defendant can "Urge his own default?" is impertinent to the case.

The National Gramophone Corporation owned the right to receive the goods deliverable under the Berliner Contract, never anything more or different. This right was a legal right, never a trust. It was a chose in action, dependent for its value upon performance, and when the Berliner Company refused to perform, that value went out, not by reason of any breach or wrong on the part of defendant, and then the National Gramophone Corporation elected, not to attempt merely to make good its loss by suit to enforce the Berliner contract, but, on the contrary, to seek greater profits through the manufacture of its own machine. It elected to break its contract with Mr. Seaman and so notified him. It proceeded with a course of business inconsistent with its obligations under the previously existing mutually executory contract.

Thereupon Mr. Seaman, consenting to the breach by the National Corporation and the cancellation, the contract was rescinded and the parties freed from all mutual obligations, and without rights either several or mutual against each other. An im-

passable barrier was thus interposed between Mr. Seaman and any claim which the National Gramophone Corporation could make under any former contracts or agreements, saving for fraud or mistake to be alleged and proved. By that barrier, the respondent, as succeeding to the rights of that corporation, is confronted in this Court, and the necessity for his claim of a first breach in fact by Mr. Seaman, is forced upon him.

The National Gramophone Corporation first broke the existing contract, refused to perform, passed resolutions and adopted a course of business in direct contravention of its contractual obligations and terminated all relations with Mr. Seaman who, thereupon, rescinded the agreement as was his right.

Respondent's Point IV.

Respondent seems mistaken in his statement in regard to Mr. Seaman that, "Except about one minute he was a Director." Such was not the fact and counsel are unable to recall any evidence from which an inference to that effect may be drawn. On the part of appellant, therefore, the allegation of trust relation by reason of official position in the corporation is controverted.

Moreover, the plaintiff has nowhere in the pleadings set up a constructive or resulting trust, or made any of the allegations pertinent to a claim such as indicated. The recent decisions of this Court that both pleadings and proof must justify the recovery decreed, are in point in this regard.

All of which is respectfully submitted.

WALDO G. MORSE,
Attorney for Appellant.

JOHN B. STANCHFIELD.
WALDO G. MORSE,
Of Counsel.

The evidence shows that the contractor filed the plans and specifications with the bureau of buildings on September 14, 1906, and on the same day a verified statement, as required by the ordinances, which were preliminary steps to the obtaining of a building permit and to the filing of the bond. Later, in October, the defendant took the required bond to the plaintiffs and requested its execution. It was executed and returned to the defendant within a day or two of its receipt. All that was required of the plaintiffs was the execution of the bond. The defendant was, by his contract, to give the requisite notices and take the necessary steps to "obtain all official inspections, permits and licenses." This put upon the defendant the duty of preparing and filing the required bond. All the plaintiffs were required to do in the premises was to execute the bond when presented. This they did without delay. Such being the facts, we think the defendant's contention is without merits. *Davies v. Clark*, 10 App. Div. 68, 41 N. Y. Supp. 825.

We, therefore, conclude that the judgment of the Municipal Court should be reversed and a new trial had in the Municipal Court on the 1st day of March, 1909. - Costs of this appeal to abide the event of the action. So ordered.

(130 App. Div. 432)

DALY v. SEAMAN.

(Supreme Court, Appellate Division, First Department. February 5, 1909.)

TRUSTS (§ 30½*)—CREATION—CORPORATIONS.

A contract between defendant and the B. Co. licensed defendant to deal in articles embodying inventions, and authorized him to organize a corporation to be approved by the B. Co., to which his rights might be assigned. Without such approval defendant organized the N. Co. and assigned to it his rights under the contract. On the B. Co. declining to recognize the N. Co., the rights were reassigned to defendant. The reassignment agreement required defendant to furnish the N. Co. with patented articles so far as he could under his contract with the B. Co. Defendant being unable to fill its demands, the N. Co. notified defendant it would procure its goods elsewhere; defendant acquiescing. Thereafter the N. Co. assigned to the N. Corporation any rights it had under its agreement with defendant. Defendant having sued the B. Co. for breaking its contract, it settled with him. The N. Co. did not participate in the litigation, and when the N. Corporation filed its schedules for a dissolution no reference was made to the contracts as an asset. *Held*, that defendant did not hold the contract as trustee for either of the N. Cos., so as to entitle it to an accounting for the proceeds of the defendant's settlement with the B. Co., though he did not reassign the stock received from the N. Co. for the original assignment of his rights.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 41; Dec. Dig. § 30½.*]

Appeal from Special Term, New York County.

Action by Eugene V. Daly, receiver of the National Gramophone Corporation, against Frank Seaman. From an interlocutory judgment ordering a reference, defendant appeals. Reversed, and new trial ordered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
114 N.Y.S.—69

Argued before PATTERSON, P. J., and INGRAHAM, LAUGHLIN, HOUGHTON, and SCOTT, JJ.

John B. Stanchfield (Waldo G. Morse, on the brief), for appellant.
James M. Gray, for respondent.

LAUGHLIN, J. The National Gramophone Corporation was duly organized under the laws of New York on the 10th day of March, 1899, and on the 13th day of December, 1901, an application was duly made to the Supreme Court in the county of Westchester for a voluntary dissolution of the corporation, and on the 5th day of April, 1902, the plaintiff was duly appointed permanent receiver in the proceedings for the dissolution of the corporation, and this action is brought by him as such receiver.

On the 10th day of October, 1896, the defendant made a certain contract, in writing, with the Berliner Gramophone Company, a corporation duly organized under the laws of Virginia, and thereafter and on the 4th day of November, 1896, made a contract with the National Gramophone Company, a domestic corporation, with a view to assigning his interest under the contract with the Berliner Company, and thereafter, and on the 1st day of October, 1897, the defendant and the National Gramophone Company made another contract purporting to reassign to the defendant the rights theretofore assigned by him to the National Gramophone Company. On the 31st day of March, 1899, the National Gramophone Company assigned and transferred to the National Gramophone Corporation all of its assets, including any interest it had in said agreement between the defendant and the Berliner Company, and all rights, title, and interest which it had under the two contracts made by it with the defendant. This action is based upon that assignment, and is brought, and the interlocutory judgment has been rendered, on the theory that the defendant, by virtue of said two contracts with the assignor of the National Gramophone Corporation, became a trustee for that corporation, and accountable to it for any profits he derived under his contract with the Berliner Company.

We are of opinion that the construction placed upon these contracts by the learned trial judge was erroneous, and that no trust relation existed between the defendant and the assignor of the National Gramophone Corporation. The Berliner Company owned certain letters patent for gramophones and for processes of producing records of sound, being the inventions of one Emile Berliner, and the purpose of the agreement of October 10, 1896, between that company and the defendant, so far as material to the issues here presented, was to license the defendant to buy, sell, and deal in gramophones and gramophone goods embodying said inventions and improvements therein throughout the United States, excepting in the District of Columbia, for a period of 15 years. It was expressly provided in the agreement that the defendant should be at liberty to organize a corporation or corporations under the laws of New York, or any other state, "with such powers and capital as the licensor may in writing approve, and after such approval the licensee may assign to said

corporation or corporations all the rights hereby granted by the licensor." With a view to assigning his rights under this contract, as therein authorized, the defendant caused the National Gramophone Company to be incorporated; but he did not obtain the approval of the Berliner Company thereto, and without such approval, by an indenture under his hand and seal, bearing date the 4th day of November, 1896, the day on which the company was incorporated, in consideration of the issue to him of capital stock of the National Gramophone Company of the par value of \$49,800 out of the total issue of the par value of \$50,000, assigned to it all his right, title, and interest in, to, and under the contract with the Berliner Company, and in and to the rights and privileges secured thereby. This assignment contains the following provisions, to wit:

"That I will use my best endeavors to secure the recognition by the said Berliner Gramophone Company of said transfer, and that, in case such recognition cannot be obtained, the said party of the first part will act with the party of the second part and place in its charge all the business to be carried out by me under said contract, obtain and turn over to said party of the second part all goods thereunder which may be advantageously used by said company, and turn over and deliver to it all profits and advantages whatever which may be derived from said contract with the Berliner Gramophone Company. To have and to hold the said contract and rights so transferred unto the said party of the second part, its successors and assigns, forever."

The National Gramophone Company issued the capital stock to the defendant, and business relations were resumed and continued between the defendant and that company under the assignment, until the 1st day of October, 1897, when, owing to the fact that the Berliner Company refused to consent to the assignment, or to recognize any rights of the National Gramophone Company thereunder, the other agreement was made between the defendant and the National Gramophone Company. This agreement recites the assignment, and that it was intended and desired by the parties that it should be recognized by the Berliner Company, that the Berliner Company declined to recognize the defendant's assignee and that it was "deemed advisable by the parties" thereto "that such assignment and transfer be modified as herein provided," and then provided that the parties had agreed as follows:

"The party of the first part shall and hereby does surrender and retransfer to the party of the second part the aforesaid contract and agreement, and all rights and privileges thereunder. And the party of the second part does hereby covenant and agree to and with the party of the first part to sell and deliver to it any and all gramophones and gramophone goods which it may require in its business, so far, and as rapidly, and in such quantities as it shall be possible for him to obtain the same under and by virtue of his said contract, and as shall be required by the parties of the first part, and that such goods be so sold and delivered at the price at which the same shall be received by him, with the addition thereto of one per centum (1%) to such price to cover any expenses of advertising which he may incur, and to compensate him for his risk and attention in carrying on such business under said contract. And it is further mutually covenanted and agreed that while the party of the first part shall purchase from the party of the second part such goods in sufficient quantities to satisfy the terms of his said contract, that he shall sell to no other person any of such goods, and shall use his best endeavors, so far as his other appointments may permit, to advance the interests of the party of the first part in selling such goods, and that the party of the first part shall use

its best endeavors to introduce such goods more generally and extend the sales of same."

Thereafter the business relations between the defendant and the National Gramophone Company were continued under the agreement of October 1, 1897, the defendant supplying all goods desired by the National Gramophone Company, so far as he was able to obtain them from the Berliner Company; but being unable to obtain sufficient to meet the demands of the National Company at all times, and on the 2d day of April, 1900, the directors of the latter company adopted a resolution that thereafter the company would procure its goods elsewhere, and notified the defendant thereof. The defendant acquiesced in this action of the National Company and proceeded to sell such goods as he was able to obtain from the Berliner Company elsewhere. Thereafter the defendant instituted various actions against the Berliner Company for violations of his contract with it, and for an injunction and an accounting, and against others, which litigations were all settled on the 3d day of February, 1903, upon the payment to him by the Berliner Company of \$35,000, and the delivery to him of stock in the Consolidated Talking Machine Company of America of the par value of \$35,000.

The defendant has been held accountable for the profits of this settlement. The precise contention made in support of the judgment is that the agreement of October 1, 1897, between the National Gramophone Company and the defendant, by which it reassigned to him all right, title, and interest derived by it under his assignment of his contract with the Berliner Company, was merely a modification of the agreement by which he made the assignment to it, and that the provisions of his assignment by which he obligated himself, in the event that the consent of the Berliner Company to the assignment should not be obtained, to account to the National Company for all profits and advantages which he might derive from the contract with the Berliner Company, remained in full force. We are of opinion that this was not the intention of the parties as manifested by the agreement; and if there were any doubt in that regard, it has been removed by the practical construction of the agreements made and acquiesced in by the parties for a long period of time. The fair construction of the reassignment agreement is that all rights theretofore assigned by defendant were reassigned to him and that the provisions of the reassignment agreement with respect to the future relations between the parties were intended to be substituted for those prescribed in the assignment, and such has been the practical construction placed upon it by the parties. The defendant, being the principal stockholder of the National Company, became a director and president thereof; but, upon it being finally determined that the consent of the Berliner Company to the assignment could not be obtained, he resigned both as president and as a director, and after these vacancies were filled a resolution was formally adopted by the board of directors, as follows:

"That the contract between the Berliner Gramophone Company and Frank Seaman, dated October 10, 1896, and assigned by said Seaman to this company upon the 4th day of November, 1896, be and the same is hereby surrendered

and retransferred to him, upon his contract and agreement to sell and deliver to this company any and all gramophones and gramophone goods which it may require, so far as it shall be possible for him to obtain same under and by virtue of his said contract, and that such goods be so delivered and sold at the place at which the same shall be received by him, with the addition of 1 per centum to such price to cover any expenses of advertising which he may incur, and to compensate him for his risk and attention in carrying on such business under said contract. Such contract shall provide that while this company shall purchase from said Seaman such goods in sufficient quantity to satisfy the terms of his said contract, that he shall sell to no other person and shall use his best endeavors, so far as his other appointments may permit, to advance the interests of the company in selling such goods, and that this company shall use its best endeavors to introduce such goods more generally and extend the sales of the same. And it was further resolved that the president be authorized to execute the necessary agreements to carry into effect this resolution."

The reassignment agreement of October 1, 1897, was based on this resolution. It also appears that at this time the National Gramophone Company was having a new type of talking machine, known as the "Zonophone," constructed by the Universal Talking Machine Company, with which it had intimate relations. At the same meeting of the board of directors at which the reassignment of the contract to the defendant was authorized, there was spread upon the minutes with respect to this new talking machine, the following:

"Our new type of machine has been completed at last, and will probably be put on the market the end of this month. We have hundreds of unfilled orders for these machines, which will show distinct improvements over everything we have ever sold, and which will yield us a greater profit as well."

That contract between the Berliner Company and the defendant precluded him from engaging in selling other goods in competition with its gramophones or gramophone goods. It is evident that the National Gramophone Company recognized that it, as an assignee of the contract, would be bound by this provision, and it is manifest that it desired to be free to deal in other similar goods. The fact that the defendant did not reassign his stock, which was the consideration he received for the assignment, is not controlling with respect to the construction of the agreement. By virtue of the agreement of October 1, 1897, the National Gramophone Company was still to receive virtually all of the profits that it would have derived from the business had the Berliner Company consented to the assignment, and it had enjoyed such profits in the meantime. It is difficult to explain the action of the National Gramophone Company in finally terminating all relations with the defendant, and refusing to be further bound by the agreement of October 1, 1897, upon any theory consistent with an understanding on its part that the defendant was still representing it and acting as its trustee for it in his relations with the Berliner Company. It was not consulted with respect to the litigation instituted by him, nor did it take part in conducting such litigation or bear any part of the expense thereof. The litigation involved more than breaches of the contract which defendant had attempted to assign to the National Company. When its successor in interest, the National Gramophone Corporation, filed its schedules in the dissolution proceeding, no reference was made

to any of these contracts as an asset. The claim, therefore, that the defendant held the contract between him and the Berliner Company as trustee for the National Gramophone Company and of its successor cannot be sustained.

The material facts are found by the court, and, in view of the documentary evidence upon which they rest, it is manifest that they cannot be changed upon a new trial. The court has, however, found as matter of fact and in the findings of fact that it was the intention of the parties that defendant should account under the assignment for any profits he might realize on or by virtue of his contract with the Berliner Company, and that said assignment was never canceled or superseded in toto by the reassignment agreement, and therefore, although these findings are, strictly speaking, conclusions of law, yet it is not entirely clear that we would be justified in changing them, or in dismissing the complaint without changing them.

It follows that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

(61 Misc. Rep. 345.)

PEOPLE ex rel. NEW YORK CENT. & H. R. R. CO. v. KENO et al.

(Supreme Court, Special Term, Onondaga County. December, 1903.)

1. TAXATION (§ 376*) — ASSESSMENT OF FRANCHISES — AUTHORITY OF VILLAGE ASSESSORS.

Under Tax Law (Laws 1899, pp. 1590, 1592, c. 712) §§ 42, 45, the state board of tax commissioners must annually fix and determine the valuation of each special franchise, subject to assessment in each city, town, or tax district, and village assessors in assessing taxable franchises of a railroad running through the village must enter the valuations of such franchises as so fixed, and, where such board has omitted to fix the value of each of such franchises in the village only, the assessors have no power to determine their value and enter the same in the assessment roll.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 376.*]

2. TAXATION (§ 496*) — ASSESSMENT WITHOUT JURISDICTION — REVIEW BY CERTIORARI.

Where the assessment is made without jurisdiction, failure to file written objections as required by Tax Law (Laws 1896, p. 810, c. 908) § 36, does not affect the right of the person taxed to review the assessment by certiorari.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 892-893; Dec. Dig. § 496.*]

Certiorari by the People, on the relation of the New York Central & Hudson River Railroad Company, against Albert P. Keno and others. Review of assessment. Assessment stricken from rolls.

Lewis, Watkins & Titus, for relator.

J. E. Rafter, for respondents.

ROGERS, J. This is a certiorari to review the relator's assessment of its franchises in the village of Mohawk, Herkimer county.

The village was incorporated by chapter 157, p. 233, Laws 1844, and is in the town of German Flats. The village of Ilion is also in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.